Supreme Court, U.S.
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No. ——— OFFICE OF THE CLERK

In The

Supreme Court of the United States

TEXTRON INC., *et al.*,

Petitioners,

v.

COMMISSIONER OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Massachusetts corporate tax law discriminate against interstate commerce in violation of the Commerce Clause by providing Massachusetts corporations with deductions that foreign corporations are not allowed, by penalizing corporations that invest in foreign subsidiaries as opposed to those that invest in Massachusetts subsidiaries, and by penalizing corporations that engage in business across state lines as compared to those that engage in business solely within Massachusetts?

2. Do taxpayers have standing to seek a refund of discriminatory taxes paid to Massachusetts where Massachusetts law provides that if the current corporate tax law is held unconstitutional, that law is deemed repealed and the tax law previously in effect will be revived and operative, and where the taxpayers would obtain a refund if the current law is, in fact, repealed and the previous tax law revived?

3. Where a state legislature enacts a statutory remedy that would repeal a tax scheme if held unconstitutional and replace it with the tax law previously in effect, does a tax administrator violate a taxpayer's due process rights under the "bait and switch" principle announced in *Reich v. Collins*, 513 U.S. 106, 111 (1994), by unilaterally issuing a policy statement providing a different remedy that is less favorable than the legislature's remedy?

LIST OF PARTIES

The petitioners in this case are Textron Inc., and the following directly or indirectly wholly-owned subsidiaries: Avco Corporation (including Avco Research Laboratory, Inc., which merged with Avco Corporation as of December 29, 1990); Turbine Engine Components Textron (Newington Operations) Inc. (f.k.a. Babco Textron Inc.); Textron Financial Corporation; and Textron Automotive Functional Components Inc. – McCord Winn Division (f.k.a. McCord Winn Textron Inc.).

The respondent is as set forth in the caption.

RULE 29.6 STATEMENT

Textron Inc. does not have a parent company, nor does any other publicly held company own 10% or more of Textron Inc.'s stock. Each of Textron Inc.'s affiliates that is a party to this case is a wholly-owned subsidiary of Textron Inc.

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PETITION FOR A WRIT OF CERTIORARI

Textron Inc. and its affiliates, as set forth above in the List of Parties, respectfully petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINIONS BELOW

The Opinion of the Supreme Judicial Court of Massachusetts (App. A at 1a-18a) is officially reported at 435 Mass. 297, 756 N.E.2d 1142 (2001). The decision of the Commonwealth of Massachusetts – Appellate Tax Board (App. B at 19a-44a) is not officially reported.

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on October 22, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, provides, in relevant part: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Relevant portions of the Massachusetts statutes are set forth as Appendix C at 45a-56a.[1]

STATEMENT

This case concerns Massachusetts' attempt to avoid the clear consequences of imposing a tax that discriminates against interstate commerce. In 1919, Massachusetts enacted the corporate tax at issue here, which is imposed on corporations qualified to do or actually doing business in the State, and repealed the corporate tax then in effect. At the same time, the Massachusetts Legislature, apparently anticipating challenges to the new tax scheme, also enacted a statute that provides that if specified provisions of the state's 1919 corporate tax law were held unconstitutional, the 1919 tax law would be repealed and replaced with the tax previously in effect (the "Legislative Remedy"). Mass. Gen. Laws ch. 63, § 52.

In this case, it is undeniable that essential provisions of the tax statute are facially discriminatory and therefore

[1] The years involved in this case are 1990, 1991 and 1992. The Massachusetts statutes reproduced in the appendix are as in effect in 1990. Subsequent amendments during the years at issue are not material to the issues raised in this petition.

unconstitutional. Taxpayers have only recently challenged the state's tax scheme because the calculations are complex and the liabilities for most companies had been relatively small. Nevertheless, the fundamental design of the tax scheme is to treat Massachusetts corporations more favorably than their foreign competitors. One provision gives Massachusetts corporations additional deductions that foreign corporations are not allowed to claim. Other provisions penalize corporations that invest in foreign subsidiaries not doing business in or registered to do business in Massachusetts. Still, other provisions penalize corporations that engage in business across state lines as opposed to corporations that engage in business solely in Massachusetts. More blatant violations of this Court's Commerce Clause doctrine are difficult to imagine.

As a result, Massachusetts is required to apply the Legislative Remedy of repealing and replacing the current discriminatory tax scheme with the tax statute previously in effect. *See City of New York v. State of New York*, 94 N.Y.2d 577, 587, 730 N.E.2d 920, 923 (2000) (over the City of New York's objection, the court held that the statutory remedy repealing the entire commuter tax applied). Massachusetts, however, has refused to implement the Legislative Remedy. Instead, respondent Commissioner has implemented a far less favorable "fix," which is directed at eliminating some, but not all, of the discriminatory defects in the state's tax law, and which may be revoked or modified at any time.

In addition, the state court's determination that petitioners lack standing to challenge unconstitutional taxes paid by them raises serious due process questions applicable to all taxpayers. In the state court's view, in light of

respondent's unilateral "fix," petitioners lack standing to even assert that the Legislative Remedy applies. To the contrary, petitioners have a due process interest in the Legislative Remedy, and such interest gives rise to standing in this case. *See Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930) (a state-enacted remedy affording a taxpayer a refund can create property interests protected by due process).

The trigger for the Legislative Remedy is the unconstitutionality of the state's tax scheme. The petitioners clearly suffered harm. The total tax paid by petitioners under the unconstitutional tax statutes is approximately $900,000 greater than the amount they would have paid under the Legislative Remedy. The lower court's determination that petitioners lack standing in this case creates the situation where only certain taxpayers (*i.e.*, those suffering direct harm from discriminatory provisions) have standing to invoke the Legislative Remedy, which is statutorily applicable to all taxpayers. In practical effect, under the lower court's holding, although petitioners stand to obtain a significant refund if the Legislative Remedy is invoked, they cannot pursue the remedy. The absence of an opportunity to seek a refund of an unconstitutional tax is an obvious due process violation. *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 22 (1990) (States must provide taxpayers "a meaningful opportunity to secure postpayment relief.").

Furthermore, although this Court has held that a State may not "bait" taxpayers with one remedy and then "switch" the remedy mid-course, *see Reich v. Collins*, 513 U.S. 106, 111 (1994), this is precisely what Massachusetts

has done in this case. Despite the clear intent of the Massachusetts Legislature to provide for the Legislative Remedy, the lower court concluded that the administrative "fix" issued by respondent was "good enough." The court's decision deprived petitioners of their due process right to seek the Legislative Remedy and also constituted an unconstitutional "bait and switch" of the state's remedy. *Id.*

A. The Business of Textron and Its Affiliates

Petitioner Textron Inc. ("Textron") is a multistate corporation engaged directly and through subsidiaries in the business of aerospace technology and the manufacture and marketing of commercial products. Textron's principal place of business and commercial domicile is in Providence, Rhode Island.

Textron filed Massachusetts combined corporate tax returns for the tax years 1990 through 1992. Petitioners Avco Corporation ("Avco") (including Avco Research Laboratory, Inc. ("Avco Research"), which merged with Avco), Textron Financial Corporation ("Textron Financial"), Turbine Engine Components Textron (Newington Operations) Inc. (f.k.a. Babco Textron Inc.) ("Babco"), and Textron Automotive Functional Component Inc. – McCord Winn Division ("McCord Winn") (f.k.a. McCord Winn Textron Inc.) are members of Textron's Massachusetts combined group. Four of the petitioners, Avco, Avco Research, Textron Financial, and Textron, are incorporated in States other than Massachusetts, and the remaining two, Babco and McCord Winn, are Massachusetts corporations.

B. Massachusetts' Corporate Tax

The Massachusetts corporate tax is based on two taxable measures: a property measure and an income measure. Corporations doing business in the Commonwealth are liable for the sum of the tax derived from both measures. Only the property measure is in dispute in this case. Mass. Gen. Laws ch. 63, §§ 32(a), 39(a).

Although thoughtful review and ciphering are necessary to appreciate the biases inherent in the property measure, the existence of such discrimination is inescapable. The first step in computing a corporation's liability under the property measure is to determine whether the corporation is to be taxed as a "tangible property corporation" or as an "intangible property corporation." Based upon the results of this classification, the next step is for the corporation to proceed to the appropriate subsection to determine its tax base and ultimate tax liability. Each step employs rules that discriminate against interstate commerce. Under the scheme, a Massachusetts corporation is more likely to be an intangible property corporation and, therefore, is more likely to be accorded more favorable treatment in computing its tax base than a foreign corporation classified as an intangible corporation.[2]

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[2] As explained by Petitioner's expert witness, Professor Richard D. Pomp, whose expert report is set forth as Appendix F at 65a-78a, the state's tax scheme draws improper distinctions between domestic and foreign corporations for classification purposes and for purposes of computing the tax base. (App. F at 67a-69a.)

Step One – Classification. In determining whether a corporation will be taxed as a tangible or an intangible property corporation, different calculations are used depending upon the taxpayer's State of incorporation. Domestic corporations (*i.e.*, those incorporated under Massachusetts law) derive a straightforward ratio, the numerator of which is the entity's tangible Massachusetts property not subject to local tax, and the denominator of which is the product of total assets not subject to local tax in Massachusetts multiplied by the corporation's Massachusetts income apportionment factor. Mass. Gen. Laws ch. 63, § 30(10).[3] If the resulting ratio is 10% or more, the corporation is classified as a tangible property corporation, and subject to the tangible property measure. A ratio of less than 10% means the corporation is an intangible property corporation, subjecting the corporation to the intangible property measure. Mass. Gen. Laws ch. 63, § 30(11).

In contrast, foreign corporations (*i.e.*, those incorporated outside Massachusetts) must use a different and less straightforward calculation. Although the numerator of the ratio is the same as for domestic corporations, a foreign corporation must further reduce the denominator of the ratio by the amount of its investment in 80% or more-owned foreign subsidiaries ("80%-owned foreign subsidiaries") not registered to do business nor doing

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[3] A corporation's Massachusetts income apportionment factor is simply the arithmetic average of four fractions, Massachusetts property/property everywhere, Massachusetts payroll/payroll everywhere, and twice Massachusetts sales/sales everywhere. Mass. Gen. Laws ch. 63, § 38(c).

business in Massachusetts. Mass. Gen. Laws ch. 63, § 30(11). If the resulting ratio is 10% or more, the corporation is a tangible property corporation, and subject to the tangible property measure. A ratio of less than 10% means the corporation is an intangible property corporation, subject to the intangible property measure. *Id.*

As a result of the above calculations, domestic corporations are more readily cast as intangible property corporations because the denominator of the ratio is always at least equal to and often greater than the denominator of a foreign corporation. This, in turn, ensures that two similarly situated corporations, different only in that one is a Massachusetts corporation and the other is a foreign corporation, will be taxed differently, and that the Massachusetts corporation will usually pay less tax under the property measure than a similarly situated foreign corporation.

Step Two – Computation of Tax Base. All corporations classified as tangible property corporations use the same method to determine the taxable amount of tangible property. Mass. Gen. Laws ch. 63, § 30(7). The tax is based on the net book value of tangible Massachusetts property not subject to local tax. As previously discussed, Massachusetts corporations are less likely than foreign corporations to be classified as tangible property corporations.

Corporations classified as intangible property corporations are taxed on net worth apportioned to Massachusetts. Significantly, the computation of net worth differs between Massachusetts and foreign corporations

and gives rise to substantial differences that favor Massachusetts corporations over their foreign competitors. Mass. Gen. Laws ch. 63, §§ 30(8), 30(9).

As a general rule, a corporation's total net worth is simply its total assets less its total liabilities. *Id.* Massachusetts deviates from this general rule in the case of Massachusetts intangible corporations, by affording those corporations two additional deductions, one for locally taxed tangible property situated in Massachusetts (less mortgages on the property) and one for investments in 80% or more-owned subsidiaries organized in Massachusetts ("80%-owned domestic subsidiaries"). Mass. Gen. Laws ch. 63, § 30(8). Foreign corporations are afforded no such deductions from the net worth base. Mass. Gen. Laws ch. 63, § 30(9).

Once a corporation's total net worth is determined, that amount is then apportioned to Massachusetts. A Massachusetts intangible corporation multiplies its total net worth by its Massachusetts income apportionment factor (*i.e.*, the average of the corporation's property, payroll, and twice sales factors) to arrive at its taxable base. Mass. Gen. Laws ch. 63, § 30(8).

In contrast, a foreign corporation uses a different (and less straightforward) apportionment scheme. A foreign intangible corporation multiplies its total net worth by the so-called "net worth factor." Mass. Gen. Laws ch. 63, § 30(9). The net worth factor is a ratio, the numerator of which is equal to total intangible assets less investment in 80%-owned foreign subsidiaries, multiplied by the corporation's Massachusetts income apportionment factor.

The result is added to the net amount of tangible Massachusetts property not subject to local tax (less mortgages). The denominator is the corporation's total assets.

Thus, a Massachusetts corporation's net worth is apportioned pursuant to factors that more fairly represent how its income is earned, *i.e.*, in-state sales, property, and payroll over total sales, property, and payroll. In contrast, a foreign corporation's net worth is apportioned pursuant to a single factor, certain Massachusetts tangible and artificially attributed intangible assets over total assets.

Section 52 Remedy. The crucial statutory provision at issue in this case is Section 52 of Chapter 63 of Massachusetts General Laws.[4] That section now provides that if specified provisions imposing the corporate tax are declared unconstitutional or inoperative by a final judgment, order, or decree of the United States Supreme Court or the Supreme Judicial Court of Massachusetts, those provisions will be null and void and the tax law that was repealed by enactment of the 1919 tax law shall be revived and become operative and applicable.

In this case, Section 52 provides the statutory basis for petitioners' refund suit. Since the property measure of the corporate tax law favors Massachusetts corporations over foreign corporations, it discriminates against interstate commerce in violation of the Commerce Clause. Therefore the Section 52 Legislative Remedy is required.

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[4] All section references are to Chapter 63 of the Massachusetts General Laws, unless otherwise noted.

The *Perini* Decision. In *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763, 647 N.E.2d 52, *cert. denied*, 516 U.S. 822 (1995), the Supreme Judicial Court of Massachusetts considered the validity of the deduction from net worth afforded domestic intangible corporations for investments in 80%-owned domestic subsidiaries, and the "deduction" from the net worth factor afforded foreign corporations for investments in 80%-owned foreign subsidiaries not doing business in Massachusetts. The court had little trouble finding this structure discriminated against interstate commerce in violation of the Commerce Clause.

On a going forward basis, however, the question arose as to how the *Perini* decision should be applied. *See Perini Corp. v. Commissioner of Revenue*, No. 93-393, [1990-1998 Transfer Binder] Mass. St. Tax. Rep. (CCH) ¶ 400-246 (Mass. May 13, 1996) (amended partial final judgment after rescript providing for the deduction as described). The State argued for the elimination of all deductions related to 80%-owned subsidiaries so no refunds would be owed. Taxpayers, on the other hand, argued for a deduction for all 80%-owned subsidiaries. Ultimately, in a supplemental opinion, the Supreme Judicial Court concluded that as a result of the *Perini* decision, a deduction would be allowed for all 80%-owned subsidiaries, and refunds would be paid accordingly.

Department of Revenue Directive 99-1. The *Perini* decision focused attention on several other discriminatory defects in Massachusetts' corporate tax scheme. As a result, this case was brought by Textron. While this case

was pending, in an apparent attempt to circumvent Section 52, respondent Commissioner issued a directive[5] purportedly allowing all corporations, domestic or foreign, to compute net worth under either the domestic or the foreign net worth computation rule, and further allowing all corporations to use either the domestic or the foreign corporation classification rule. In addition, in computing net worth, the directive allows all intangible corporations to deduct their investments in all 80%-owned subsidiaries, regardless of whether the parent or subsidiary is a domestic or foreign corporation. *See* Massachusetts Dep't of Revenue, Corporate Excise DOR Directive 99-1 (Jan. 4, 1999) ("Respondent's Policy Statement 99-1"), set forth as Appendix D at 57a-62a, and Massachusetts Dep't of Revenue, Technical Information Release TIR 99-3 (Feb. 11, 1999) (clarifying the application of Respondent's Policy Statement 99-1), set forth as Appendix E at 63a-64a. As a mere policy statement of respondent, the directive does not have the effect of repealing the discriminatory statutes, and respondent has the authority to unilaterally revoke or modify the directive at any time without notice or public hearing.

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[5] A Department of Revenue "directive" is defined as "a public written statement . . . which provides details or supplementary information; clarifies ambiguities; resolves inconsistencies; or explains or elaborates upon issues, concerning current Department policy, practice or interpretation." Mass. Regs. Code tit. 830, § 62C.3.1(6)(b).

C. The Procedural Background

For each tax year at issue (*i.e.*, the years 1990, 1991 and 1992),[6] all of the petitioners, except Textron, calculated the property measure of the corporate tax as tangible property corporations. Textron calculated the property measure of the tax as a foreign intangible property corporation.

On October 8, 1996, petitioners filed an application for abatement (*i.e.*, a claim for refund) for $906,031 plus interest on the ground that the property measure of the state's tax scheme discriminates against interstate commerce and thus is unconstitutional. The refund claimed is the difference between petitioners' tax liability calculated under the current tax scheme and under the Legislative Remedy.[7]

Respondent denied any abatement under the Legislative Remedy, but eventually (while this case was pending) allowed a partial abatement pursuant to the rules announced in Respondent's Policy Statement 99-1. (App. D at 57a-62a.) Under that policy statement, the computation of Textron's tax under the statute was disregarded and, instead, was recomputed under the domestic corporation computation. This resulted in a refund of $36,355.

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[6] The applicable statute of limitations precludes refunds for any period prior to 1990. Similarly, if the Legislative Remedy is applied generally, taxpayer refunds would be allowed only for periods not closed by the statute of limitations.

[7] Other issues raised in the original application for abatement (refund) were resolved by the parties.

1. Massachusetts Appellate Tax Board

In October 2000, the Appellate Tax Board ("Board") upheld respondent's denial of the application for abatement. The Board first concluded that all of the petitioners lack standing to challenge the constitutionality of Sections 30(10) and (11) (App. B at 31a), relating to the classification of corporations as tangible or intangible property corporations, and that only one, Textron, had standing to challenge the constitutionality of Sections 30(8) and (9), relating to the calculation of net worth. (App. B at 33a.)

Next, the Board determined that although the provisions of Sections 30(8) and (9) impose a greater tax burden on foreign corporations, the different statutory treatment was narrowly drawn to serve an alleged state interest (the avoidance of taxing extraterritorial income), and thus, the provisions were purportedly not unconstitutional under the Commerce Clause. (App. B at 37a-38a.) Although unnecessary, the Board further determined that the Legislative Remedy would not apply even if Sections 30(8) and (9) were unconstitutional. (App. B at 37a.) The Board concluded that Respondent's Policy Statement 99-1 "interpreted" the tax statute in a manner that avoided potential constitutional infirmities. (App. B at 43a.)

2. Supreme Judicial Court of Massachusetts

In October 2001, on an application for direct appellate review, the Supreme Judicial Court of Massachusetts affirmed the decision of the Appellate Tax Board. (App. A at 1a-18a.) The court's opinion essentially paralleled the

Board's decision except the court concluded that even Textron did not have standing to challenge the constitutionality of Sections 30(8) and (9), even though, as a foreign corporation, it was subject to less favorable rules than domestic corporations in calculating net worth. (App. A at 14a.) In this regard, the court determined that because of Respondent's Policy Statement 99-1, Textron was allegedly not adversely affected by the challenged provisions. Although unnecessary to the disposition of the case given the court's decision on the standing issue, the court also determined that Respondent's Policy Statement 99-1 "erased the effect of any constitutional infirmities that may exist in the different statutory formulae" and suggested that the Section 52 Legislative Remedy was not applicable in this case. (App. A at 16a.)

REASONS FOR GRANTING THE PETITION

The opinion of the Supreme Judicial Court of Massachusetts in this case warrants review for four compelling reasons. First, the opinion conflicts with settled decisions of this Court that make it clear that a State may not discriminate against interstate commerce by favoring domestic corporations or corporations engaged in activities within the State over foreign corporations or corporations engaged in business across state lines. Second, the opinion's determination that taxpayers do not have standing to challenge unconstitutional taxes paid by them is irreconcilable with decisions of this Court to the contrary and also raises serious policy issues for all state taxpayers. Third, the opinion's reliance on Respondent's

Policy Statement 99-1, which was allegedly aimed at eliminating some, but not all, of the discriminatory features of the tax scheme, deprives petitioners of the right to pursue the Legislative Remedy and also conflicts with decisions of this Court that a State may not "bait and switch" remedies mid-course. And fourth, this case raises issues of great importance to interstate commerce. The lower court's opinion upholding a facially discriminatory tax scheme undermines essential constitutional restraints on state taxation and threatens to undermine national commerce.

I. THE MASSACHUSETTS CORPORATE TAX STATUTES FAVOR MASSACHUSETTS CORPORATIONS OVER FOREIGN CORPORATIONS, IN VIOLATION OF THE COMMERCE CLAUSE

A. The Massachusetts Tax Scheme Discriminates Against Interstate Commerce in Three Discrete Ways

The prohibition of taxes that discriminate against interstate commerce is a central tenet of this Court's Commerce Clause jurisprudence. *See, e.g., Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Or.*, 511 U.S. 93 (1994). In this context, "discrimination" means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 99; *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.").

No aspect of this doctrine is more firmly established than the principle that a State may not favor in-state over out-of-state entities. Indeed, recently the Court applied this principle in striking down Alabama's franchise tax in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999). In that case, Alabama's taxing scheme favored domestic over foreign corporations by giving domestic – but not foreign – corporations the ability to reduce their franchise tax liability by reducing the par value of their stock. *Id.* at 169. Observing that the tax "facially discriminates against interstate commerce," *id.*, a unanimous Court invalidated the tax in short order.

The Massachusetts tax law at issue here discriminates against interstate commerce in three ways. First, Massachusetts' tax scheme is no different in substance from Alabama's domestic preference legislation condemned in *South Central Bell*. As in *South Central Bell*, the Massachusetts' statute treats local corporations more favorably than their out-of-state competitors in several respects, even after the state court's decision in *Perini Corp. v. Commission of Revenue*, 419 Mass. 763, 647 N.E.2d 52, *cert. denied*, 516 U.S. 822 (1995).

The most glaring discriminatory provision is the net worth calculation for intangible corporations. Massachusetts' taxing scheme favors Massachusetts intangible corporations over their foreign counterparts by giving Massachusetts – but not foreign – corporations *two* additional deductions in arriving at net worth. Domestic corporations deduct from their tax base the value of 80%-owned subsidiaries and the value of tangible property located in Massachusetts that is subject to local tax. Mass.

Gen. Laws ch. 63, § 30(8).[8] A more blatant violation of this Court's Commerce Clause doctrine is difficult to imagine. A deduction from the tax base for only Massachusetts corporations, but not foreign corporations, facially discriminates against interstate commerce. *See, e.g., Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984) (striking down a state tax exemption available only for locally produced alcoholic beverages).

Second, the Massachusetts tax scheme also discriminates against interstate commerce by using one classification ratio for Massachusetts corporations and a different ratio for foreign corporations. Mass. Gen. Laws ch. 63, §§ 30(10), 30(11). A Massachusetts corporation's denominator will always be equal to or greater than a foreign corporation's denominator. This is so because a foreign – but not a Massachusetts – corporation is required to reduce its denominator by investments in 80%-owned foreign subsidiaries not registered to do business nor doing business in Massachusetts. Mass. Gen. Laws ch. 63, § 30(11). This produces a lower ratio for a Massachusetts corporation, thereby increasing the likelihood of its being taxed as an intangible property corporation. Once so classified, a Massachusetts corporation benefits from the additional deductions described in the preceding paragraph that are not available to a foreign corporation.

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[8] A foreign corporation reduces the numerator of its net worth factor by its investment in 80%-owned subsidiaries. However, a reduction in the fraction used to apportion the net worth base to Massachusetts is not as beneficial to a taxpayer as a deduction that directly reduces the net worth base. Mass. Gen. Laws ch. 63, § 30(9).

Third, the classification ratio for foreign corporations also discriminates against interstate commerce in another way. As noted, foreign corporations must reduce the denominator of their classification ratio by investments in 80%-owned *foreign* subsidiaries not registered to do business nor doing business in Massachusetts; no equivalent reduction is required for investment in Massachusetts subsidiaries. The reduction of the denominator only for investments in foreign subsidiaries engaged in business outside Massachusetts creates a strong incentive for foreign corporations to acquire in-state subsidiaries, and penalizes corporations that choose to engage in business outside the State. In essence, a taxpayer that invests in a corporation engaged in activity outside Massachusetts is penalized in comparison to its competitor that invests in a corporation that plies its trade solely within the State. Again, such a rule facially discriminates against interstate commerce. *See Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

* * * * *

In sum, it is undeniable that the Massachusetts tax scheme discriminates against interstate commerce. This Court has declared, "[t]he commerce clause forbids discrimination, whether forthright or ingenious. In each case, it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940) (footnote omitted).

B. Respondent's Policy Statement 99-1 Cannot "Save" the State's Facially Discriminatory Tax Scheme

Respondent's Policy Statement 99-1 provides no reason for this Court to refrain from holding the Massachusetts tax scheme unconstitutional. It is a well-settled rule that " 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' " *See Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Indeed, in *City of Mesquite*, 455 U.S. at 289, this Court reasoned that although the challenged statute had been eliminated while the case was pending in the Court of Appeals, the case was not moot, because the defendant's "repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated."

The reasoning applied in *City of Mesquite* applies with even more compelling force here. The Massachusetts Legislature has not repealed the objectionable language in this case; the discriminatory provisions remain in force. Respondent has merely issued, on a unilateral basis, a statement setting forth its new guidelines, which it can revoke or modify at any time without notice or public hearing. Mass. Regs. Code tit. 830, § 62C.3.1(6). Accordingly, these impermanent guidelines provide no basis for depriving this Court of its power to determine the constitutionality of the state's tax scheme. Indeed, even the Appellate Tax Board below recognized the infirmities of Respondent's Policy Statement 99-1. *See* App. B at 37a

("Moreover, the DOR's unilateral issuance of a directive such as DD 99-1 may not be a sufficiently final discontinuance of a challenged behavior, such as the legislative change of a statute, to guarantee that the challenged activity could not reoccur." (citing Laurence H. Tribe, *American Constitutional Law* 355-56 (3d ed. 2000))).

Furthermore, the Commissioner's efforts to remove discriminatory features from the state's tax law are not reassuring. Although Respondent's Policy Statement 99-1 is aimed at curing what respondent perceives as the discriminatory defects in the excise law, that statement does not eliminate all discrimination in the property measure. Even after Respondent's Policy Statement 99-1 is taken into account, the tax scheme continues to discriminate against interstate commerce.[9]

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[9] The directive allows all intangible property corporations to compute net worth under either the domestic or the foreign corporation calculation. Most, if not all, corporations would choose the domestic corporation calculation because of the two additional deductions from net worth. However, the domestic corporation calculation itself discriminates against interstate commerce. That rule provides a deduction for property situated in Massachusetts that is locally taxed, but not for property that is situated outside the State. Mass. Gen. Laws ch. 63, § 30(8). Such a rule rewards corporations that do business only within Massachusetts and disfavors those that engage in business across state lines. Accordingly, the rule discriminates against interstate commerce. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (invalidating a state exemption only for liquor produced in the State); *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71 (1992) (invalidating a state deduction only for dividends paid from domestic corporations, not from foreign corporations); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (striking down a property tax scheme that reduced the

In sum, Respondent's Policy Statement 99-1 cannot "save" the challenged tax scheme. It is nothing more than an acknowledgement by respondent of some of the tax scheme's discriminatory defects. Accordingly, the constitutionality of the challenged statutes should be considered apart from Respondent's Policy Statement 99-1.

II. THE LOWER COURT'S DETERMINATION THAT PETITIONERS LACK STANDING IN THIS CASE CONFLICTS WITH SETTLED DECISIONS OF THIS COURT THAT TAXPAYERS HAVE STANDING AS WELL AS A DUE PROCESS RIGHT TO CONTEST UNCONSTITUTIONAL TAXES PAID

The Massachusetts Supreme Judicial Court's determination that petitioners lack standing in this case is incompatible with this Court's decisions and upsets the settled principle that taxpayers have standing to contest the validity of their previous or existing tax obligations.

It is axiomatic that taxpayers have standing to bring suit to recover unconstitutional taxes paid by them. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court dismissed any notion that taxpayers lacked standing to challenge a state wholesale liquor tax that they had paid. There, the State argued that taxpayers did not have standing to challenge the constitutionality of the tax since the taxpayers were allowed to pass the tax on to customers. In rejecting this argument, the Court declared

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value of taxable stock assessed equal to the percentage of the corporation's income subject to tax in the State).

that taxpayers "plainly have standing" to challenge taxes imposed on them:

> The wholesalers are, however, liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills. Furthermore, even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business. The wholesalers plainly have standing to challenge the tax in this Court.

Id. at 267. *See also* Laurence H. Tribe, *American Constitutional Law* 421 (3d ed. 2000) ("A taxpayer of course has standing to challenge the validity or application of a taxing statute in determining his or her own tax obligation.").

Here, it is equally plain that petitioners have standing to challenge the tax imposed by Massachusetts. This is a case for recovery of taxes paid by petitioners. There is a concrete case or controversy. There is no dispute that petitioners were subject to the discriminatory Massachusetts corporate tax and that petitioners, in fact, paid substantial taxes to the State. Petitioners stand to recover more than $900,000 in taxes paid. Accordingly, petitioners "plainly have standing to challenge the tax in this Court." *Bacchus Imports*, 468 U.S. at 269.

Moreover, if petitioners had chosen not to pay the disputed tax and Massachusetts had brought suit to collect a purported tax deficiency, there is serious doubt, under the lower court's reasoning, whether the petitioners would have had standing to challenge the asserted tax liability. Such a result would conflict with the most basic notions of due process. *Id.*

Furthermore, the Supreme Judicial Court's determination that Textron lacks standing is particularly egregious. Indeed, even the Appellate Tax Board determined that Textron had standing. *See* App. B at 36a-37a ("The Board found that Textron had standing notwithstanding the Commissioner's issuance of DD 99-1.").

The lower court misapprehends the harm suffered by petitioners. The unconstitutionality of the tax scheme adversely affects petitioners because such unconstitutionality triggers the Legislative Remedy. Under the current tax scheme, petitioners paid significantly more tax than is due under the Legislative Remedy. By being required to pay more tax than is due, petitioners are clearly harmed.

Moreover, if the lower court's analysis is correct, only certain taxpayers have standing to invoke the Legislative Remedy, even though such remedy directly affects all taxpayers. Nothing in Section 52 supports such a position, and furthermore such a proposition clearly contravenes settled due process rights.

In practical effect, the court's holding means that petitioners (and those similarly situated to the petitioners) have no means to contest the validity of the unconstitutional taxes collected by Massachusetts. Such a

rule violates essential Due Process Clause protections. *See, e.g., Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673, 681-82 (1930) (Concluding that the State had not afforded a taxpayer an opportunity to challenge taxes paid, the Court declared: "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, – whether it has had an opportunity to present its case and be heard in its support. . . . [W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law."); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.,* 496 U.S. 18, 22 (1990) (States must provide taxpayers "a meaningful opportunity to secure postpayment relief.").

III. THE STATE'S ATTEMPT TO SUBSTITUTE THE REMEDY IN RESPONDENT'S POLICY STATEMENT 99-1 IN LIEU OF THE STATUTORILY REQUIRED REMEDY CONSTITUTES A "BAIT AND SWITCH" IN VIOLATION OF THE DUE PROCESS CLAUSE

Due Process requires States to provide taxpayers a " 'clear and certain remedy' for any erroneous or unlawful tax collection to ensure the opportunity to contest the tax is a meaningful one." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.,* 496 U.S. 18, 39 (1990) (citation omitted). Although a State is free to reconfigure its remedial scheme over time to fit changing needs, what a State may not do is "to reconfigure its scheme, unfairly, in mid-course – to 'bait and switch,' as some have described it." *Reich v. Collins,*

513 U.S. 106, 111 (1994). Applying these principles in *Reich*, this Court held that Georgia impermissibly held out what plainly appeared to be a clear and certain post-deprivation remedy that provided for a refund and then declared, only after the disputed taxes had been paid, that no such remedy existed. *Id.*

Massachusetts' actions in this case parallel those struck down in *Reich*. Here, as in *Reich*, the State provided for a clear and certain post-deprivation remedy. Massachusetts law provides a post-deprivation remedy in the form of a refund. In addition, Massachusetts law also provides a specific method for calculating the amount of the refund if specific provisions of the state's tax scheme are held unconstitutional or inoperative. Mass. Gen. Laws ch. 63, § 52. That method is the repeal of the current tax provisions, and the revival of the prior tax provision (*i.e.*, the Legislative Remedy). *Id.* The revived provision, Massachusetts Acts of 1909, Chapter 490, Part III, which is deemed to be operative in lieu of the unconstitutional tax scheme, exacts a tax based on the capitalization of authorized stock of a foreign corporation and is capped at $2,000 per taxpayer.

The lower court's substitution of the unilaterally adopted administrative "remedy" in Respondent's Policy Statement 99-1, which was issued after the refund claims were filed in this case but before the trial, in lieu of Section 52, constitutes a "bait and switch" in violation of the principles announced in *Reich*. Massachusetts held out a clear and certain remedy in the form of Section 52.

The lower court concluded that "[the policy statement's] application to a corporate taxpayer effectively

severs the challenged provisions from the remainder of the statute." (App. A at 17a.) The court, however, incorrectly assumed that it had unlimited authority in crafting the remedy in this case, " '[a]ny of a variety of methods of curing an unconstitutional tax is permissible.' " (App. A at 17a (citations omitted).) Rather, the court was required to apply the remedy enacted by the Legislature. Indeed, in a similar context, the Court of Appeals of New York recently applied a legislative remedy repealing the entire New York City commuter tax pursuant to a statute authorizing the tax scheme's repeal if a partial repeal was declared void by a court. *City of New York v. State of New York*, 94 N.Y.2d 577, 587, 730 N.E.2d 920, 923 (2000). There, the state legislature rescinded the commuter tax for in-state commuters but not for out-of-state commuters, and at the same time enacted a statute repealing the entire commuter tax if a court struck down the partial repeal. *Id.* Finding that the partial repeal violated the Privileges and Immunities and Commerce Clauses of the United States Constitution, the court determined that the statute repealing the entire tax took effect. *Id.*

In this case, the fundamental flaw in the lower court's reasoning is that it ignored petitioners' due process interest in the Section 52 remedy. *Reich v. Collins*, 513 U.S. 106 (1994); *see also Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930) (a State-enacted remedy affording a taxpayer a refund can create property interests protected by due process). In this case, the bait and switch tactics of the State are more egregious than in *Reich*. In *Reich*, the State at least asserted that the taxpayer had an alternate procedure for contesting the tax, albeit one in which he could not take advantage. In this case,

the court concluded that Respondent's Policy Statement 99-1 cured all constitutional defects in the state's tax law, and therefore petitioners allegedly lack standing. In the lower court's view, since Respondent's Policy Statement 99-1 "effectively severs the challenged provisions from the remainder of the statutes" (App. A at 17a), there is allegedly no longer any unconstitutional defects in the tax scheme upon which to invoke the Legislative Remedy in Section 52.

The court's reasoning is defective for three reasons. First, as explained previously, Respondent's Policy Statement 99-1 does not "effectively sever" all unconstitutional defects from the statutes. Even after the directive is taken into account, the domestic net worth computation favors corporations that engage in business solely in Massachusetts over those that engage in business across state lines. Second, under the court's reasoning, petitioners have no opportunity, meaningful or otherwise, to challenge the state's tax scheme or invoke the Legislative Remedy because, in the court's view, the tax scheme is no longer discriminatory. Third, the court's reasoning violates the "bait and switch" principle in that the State offered the Legislative Remedy as the specific remedy in the event that provisions of the state's tax law are held unconstitutional or inoperative and then substituted Respondent's Policy Statement 99-1 in lieu of that remedy.

IV. THIS CASE RAISES ISSUES OF GREAT NATIONAL IMPORTANCE

The issues presented in this case have serious implications for interstate commerce and taxpayers that engage in business across state lines. If States are allowed to favor domestic corporations over their foreign counterparts and to favor corporations that invest in property within the State over those that invest outside the State, the essential constitutional protection of interstate commerce would be illusory.

Moreover, the lower court's holding that respondent's unilateral administrative "fix" of the state's discriminatory tax scheme cannot be reviewed or challenged because taxpayers no longer have standing establishes dangerous precedent. In effect, under the lower court's holding, if a State imposes a discriminatory tax statute and then unilaterally "fixes" the discrimination, such state action removes a taxpayer's standing to challenge the statute and the alleged "fix," even if the "fix" is only temporary and even if the "fix" fails to cure all discriminatory features in the statute. Clearly, leaving in the hands of state taxing authorities the power to partially "fix" discriminatory tax schemes and to deprive taxpayers of refunds by claiming they lack standing to challenge such schemes opens the door for other States to follow Massachusetts' lead, resulting in economic balkanization.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

AT BOSTON, October 22, 2001

IN THE CASE NO. SJC-08494

TEXTRON INC. & others

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vs.

COMMISSIONER OF REVENUE

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pending in the Appellate Tax Board
for the County of _____ Nos. F242168; F242193; F245676; F250551; F250552; F250553

ORDERED, that the following entry be made in the docket; viz., –

The decision of the Appellate Tax Board is affirmed.

BY THE COURT,

/s/ [Illegible], Asst. CLERK.

October 22, 2001

SJC-08494

TEXTRON INC. & others[1] vs.
COMMISSIONER OF REVENUE.

Suffolk. September 10, 2001. – October 22, 2001.

Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ.

Taxation, Corporate excise, Commissioner of revenue. Constitutional Law, Taxation, Standing, Commerce clause. Practice, Civil, Standing. Commissioner of Revenue.

Appeal from a decision of the Appellate Tax Board.

The Supreme Judicial Court granted an application for direct appellate review.

Paul H. Frankel, of New York (Craig B. Fields, of New York, & Maxwell D. Solet with him) for the taxpayers.

Juliana deHaan Rice, Assistant Attorney General (Harvey Pullman with her) for Commissioner of Revenue.

GREANEY, J. This is an appeal from a decision of the Appellate Tax Board (board) affirming the partial denial by the Commissioner of Revenue (commissioner) of applications by Textron Inc. and five related corporations (collectively, Textron, except where it is necessary to identify a specific corporation) for the abatement of corporate excise taxes imposed for the tax years 1990 through 1992.

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[1] Avco Research Laboratory, Inc.; Avco Corporation; Turbine Engine Components Textron (Newington Operations) Inc.; Textron Financial Corporation; and Textron Automotive Functional Components Inc. – McCord Winn Division.

Textron claims that four of the fifteen definitional provisions set forth in G. L. c. 63, § 30, pertaining to the calculation of the corporate excise tax, are unconstitutional because they impermissibly burden interstate commerce in violation of the commerce clause of the United States Constitution. Textron seeks to have the current corporate excise tax repealed in its entirety, replacing it with the law that was in effect before 1919 (under which all corporations, domestic and foreign, were required to pay an annual tax of not more than $2,000). We granted Textron's application for direct appellate review and now affirm the board's decision.

We summarize the background of the case.[2] The six taxpayers in this appeal are members of a nationally consolidated corporate group that filed Massachusetts combined corporate excise returns for tax years 1990 through 1992. Textron Inc., a multistate corporation involved in the business of aerospace technology and the manufacture of commercial products, whose principal place of business and commercial domicil is Providence, Rhode Island, is the reporting corporation for the controlled group. Three of the remaining five taxpayers, Avco Corporation (Avco); Avco Research Laboratory, Inc. (Avco Research); and Textron Financial Corporation (Textron Financial), also are incorporated in States other than Massachusetts, and two, Babco Corporation (Babco) and Textron Automotive Functional Components Inc. –

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[2] Our factual summary is drawn primarily from the board's findings of facts, which were based on a stipulation of facts, a supplemental stipulation of facts, and testimony and exhibits.

McCord Winn Division (McCord Winn), are Massachusetts corporations. For each tax year at issue, all of the taxpayers except Textron Inc. paid excises as tangible property corporations as defined by G. L. c. 63, § 30 (10).[3] Textron Inc. paid excises as an intangible property corporation as defined by G. L. c. 63, § 30 (11).[4]

On October 8, 1996, Textron Inc. filed an application for the abatement of corporate excise tax totaling $1,328,248 (plus interest and penalties) for Textron for the tax years 1990, 1991, and 1992. The application was based on the premise that disparate treatment accorded to

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[3] Section 30 (10) defines a "[t]angible property corporation" as one "whose tangible property . . . is ten per cent or more of . . . its total assets . . . less those assets as are situated in the commonwealth . . . and are subject to local taxation, and, for a foreign corporation, less its investment . . . in foreign corporations not registered to do business nor doing business in the commonwealth, as shall be found by multiplying said amount by such corporation's income apportionment percentage, as determined under the provisions of section thirty-eight, or a corporation which, in the judgment of the commissioner, should be so classified."

[4] Section 30 (11) defines an "[i]ntangible property corporation" as one "whose tangible property situated in the commonwealth . . . not subject to local taxation is less than ten per cent of . . . its total assets . . . less those assets as are situated in the commonwealth . . . and are subject to local taxation, and, for a foreign corporation, less its investment . . . in foreign corporations not registered to do business nor doing business in the commonwealth, as shall be found by multiplying said amount by such corporation's income apportionment percentage, as determined under the provisions of section thirty-eight, or a corporation which, in the judgment of the commissioner, should be so classified."

domestic and foreign corporations[5] in the classification of tangible and intangible property corporations under G. L. c. 63, § 30 (10) and (11), see notes 3 and 4, supra, and in the measure of an intangible property corporation's taxable net worth under § 30 (8) and (9),[6] is facially discriminatory and creates fatal flaws in the main design of §§ 32 and 39,[7] which in turn triggers the automatic statutory repeal and the revival of prior law, as provided for by G. L. c. 63, § 52.[8] The commissioner denied the applications

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[5] A "[f]oreign corporation[ ]," as defined in G. L. c. 63, § 30 (2), includes corporations or associations established, organized, or chartered under the laws of other States of the United States or of any foreign nation.

[6] A corporation that meets the mathematical test of an "intangible property corporation" under G. L. c. 63, § 30 (11), must compute its excise based, in part, on its taxable net worth. Calculations for the measure of net worth for domestic intangible property corporations under § 30 (8), and for the measure of net worth for foreign intangible property corporations under § 30 (9), differ significantly and will be discussed later in this opinion.

[7] General Laws c. 63, §§ 32 and 39, are the basic tax-imposing provisions of the corporate excise tax. Section 32 applies to domestic corporations, and § 39 applies to foreign corporations.

[8] General Laws c. 63, § 52, provides, in material part:

> "If the provisions of [§ 32] imposing an excise on domestic business corporations . . . are declared unconstitutional or inoperative [by the United States Supreme Court or by this court], such portion of the law relating to business corporations [set forth in §§ 30-42B relating to domestic corporations] . . . shall be null and void, and . . . shall become inapplicable to such corporations. In such event, all laws applicable to domestic business corporations [prior to 1919]

(or was deemed to have denied them by letting six months pass without acting on them) and Textron appealed from the denials to the board.

On January 4, 1999, prior to the hearing of the appeals, the Department of Revenue (department) issued DD 99-1 (Jan. 4, 1999) 3 Official MassTax Guide at 657 (West 2001) (directive). Recognizing that corporations were required to employ different formulae in determining their corporate excise tax liability depending on place of incorporation, and acknowledging pending constitutional challenges to this divergent treatment, the directive provided that taxpayers could choose the formulas they preferred to determine whether a corporation is a tangible property corporation or an intangible property corporation under § 30 (10) or (11), and calculate the net worth of an intangible property corporation under either

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shall thereupon be revived and become operative and applicable . . . . If the provisions of [§ 39] imposing an excise on foreign corporations . . . . are declared unconstitutional or inoperative . . . such portion of the law relating to business corporations . . . as set forth in [§§ 30-42B relating to foreign corporations] shall be null and void, and . . . shall become inapplicable to such corporations. In such event, all laws applicable to foreign corporations [prior to 1919] shall thereupon be revived and become operative and applicable in respect to such corporations . . . . If any part, section or subdivision of [§§ 30-42B], other than the provisions in [§§ 32, 38C, 39, or 42B] imposing an excise, shall be declared unconstitutional or inoperative, the remaining parts of [§§ 30-42B] shall not be affected thereby."

§ 30 (8) or (9), regardless of their status as a domestic or foreign corporation.[9]

The directive's application resulted in Textron Inc.'s having no tax liability under the nonincome measure of the corporate excise in each of the tax years at issue. As a result, the commissioner granted Textron Inc. a partial abatement of $36,355 (exclusive of statutory additions). The commissioner, however, still denied (or was deemed to have denied) the portion of the abatement claims which would apply the "repeal and revival" remedy contained in G. L. c. 63, § 52, to Textron. The amount of corporate excises remaining in dispute was stipulated to be $869,675 (exclusive of statutory additions).

The main issue before the board was whether Textron was entitled to abatements due to alleged constitutional infirmities in G. L. c. 63, § 30 (10) and (11), defining tangible and intangible property corporations, and § 30 (8) and (9), defining the nonincome measure of the corporate excise tax for domestic and foreign intangible property corporations. The board attacked the problem in different ways. First, the board found that all of the taxpayers lacked standing to challenge the constitutionality of § 30 (10) and (11), and that only one, Textron Inc., had standing to challenge the constitutionality of § 30 (8) and (9). Next, the board decided that, although the provisions of (8) and (9) may impose a greater tax burden on foreign corporations, the different statutory

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[9] The directive was issued in conjunction with TIR 99-3 (Feb. 11, 1999), 3 Official MassTax Guide at 597 (West 2001), which clarified the effective date of the directive and specified the method whereby elections could be made.

treatment was narrowly drawn to serve a legitimate State interest (the avoidance of taxing extraterritorial income), and, thus, the provisions were not unconstitutional under the commerce clause. The board further determined that, even if the provisions of § 30 (8) and (9) were unconstitutional under the commerce clause, Textron was not entitled to the "repeal and revival" remedy it sought under G. L. c. 63, § 52. The board concluded that the commissioner, in issuing the directive, had interpreted the corporate excise statutes in a manner that avoided potential constitutional issues and that conformed to the judicial guidance expressed in our decision in Perini Corp. v. Commissioner of Revenue, 419 Mass. 763, cert. denied, 516 U.S. 822 (1995) (examining constitutionality under the commerce clause of other provisions of § 30 [8] and [9]), and the recommendations of a single justice of this court made pursuant to the rescript in that decision as to the proper remedy. See S.J.C. No. SJ-93-0393. Due to the application of the directive, the board reasoned that Textron, Inc., was not treated differently because of its status as a foreign corporation.

In order to clarify the issues in this appeal, we now briefly outline the relevant provisions of the corporate excise tax statutory scheme. Under the nearly identical language of G. L. c. 63, §§ 32 and 39, domestic and foreign corporations doing business in the Commonwealth are required to pay an excise based, in part, on a percentage of their net income and, in part, on a percentage of the value of their property. See G. L. c. 63, §§ 32 (setting excise rates applicable to domestic corporations) and 39 (setting excise rates applicable to foreign corporations).

See also St. 1969, c. 546, §§ 18, 21 (imposing comprehensive surtax applicable to percentage rates contained in G. L. c. 63, §§ 32 and 39); G. L. c. 63, § 31B, inserted by St. 1970, c. 634, § 3 (reducing rate applicable to property measure to $2.60 per thousand [including surtax], or 0.26%). The property, or non-income, portion of the excise is measured by a corporation's tangible property, if the corporation is classified as a "tangible property corporation" under § 30 (10), see note 3, supra, or by its net worth if classified as an "intangible property corporation" under § 30 (11), see note 4, supra.

Whether a corporation is classified as a tangible property corporation (with tangible property as its property-tax base) or an intangible property corporation (with net worth as its property-tax base) depends, in simplified terms, on the ratio of its tangible property to its total assets. If the ratio is ten per cent or more, the corporation is a tangible property corporation under § 30 (10); if less than ten per cent, an intangible property corporation under § 30 (11). The one difference in the tangible-intangible property fraction for domestic and foreign corporations is that, in the case of a foreign corporation, the "total assets" in the fraction's denominator is reduced by "its investment . . . in foreign corporations not registered to do business nor doing business in the commonwealth." G. L. c. 63, § 30 (10) and (11). This foreign subsidiary deduction has the effect of increasing the value of the fraction, as compared with the fraction for a domestic corporation similarly situated, and tends to increase the likelihood that foreign corporations will be classified as tangible property corporations, as compared with domestic corporations.

The formulae used by domestic and foreign intangible property corporations to calculate their net worth are contained in § 30 (8) and (9), respectively. See note 6, supra. Section 30 (8) defines the net worth of a domestic corporation as:

> "such portion of . . . its total assets . . . less the sum of (1) its liabilities . . . (2) . . . its tangible property situated in the commonwealth . . . subject to local taxation . . . (3) . . . its investment in subsidiary corporations organized in the commonwealth which represent eighty per cent or more of the voting stock of said corporations, as shall be found by multiplying said amount by such corporation's income apportionment percentage, as determined under the provisions of section thirty-eight" (emphasis supplied).

Section 30 (9) is more complicated and defines the net worth of a foreign corporation as:

> "such portion of the book value of its total assets less its liabilities . . . as the book value of its tangible assets situated within the commonwealth . . . not subject to local taxation plus the amount of its intangible assets . . . allocable to this commonwealth . . . bear to the book value of its total assets on said date. The intangible assets allocable to this commonwealth shall be such portion of the book value of its total intangible assets . . . less the book value . . . of its investment in and advances to subsidiary corporations not doing business in the commonwealth which represent eighty per cent or more of the voting stock of said corporations, as shall be found by multiplying said amount by such corporation's income apportionment percentage, as

determined under the provisions of section thirty-eight" (emphasis supplied).

In Perini Corp. v. Commissioner of Revenue, supra, this court addressed the constitutionality of two deductions used in computing the taxable net worth of domestic and foreign intangible property corporations and concluded that the challenged deductions, in italics above, discriminated against interstate commerce in violation of the commerce clause of the United States Constitution. In accordance with the recommendation of a single justice of this court made pursuant to this court's order in the Perini decision, a final judgment after rescript was entered which, the parties agree, had the practical effect of severing the offending language from the remaining provisions of § 30 (8) and (9), so that intangible property corporations, no matter where incorporated, are allowed to deduct the value of all subsidiaries, regardless of the subsidiaries' place of incorporation.[10] See S.J.C. No. SJ-93-0393 (June 6, 1999).

1. We turn to Textron's claim that the classifications contained in G. L. c. 63, § 30 (10) and (11), impermissibly burden interstate commerce by according a foreign subsidiary deduction to foreign, but not to domestic, corporations. This claim appears to be based on the premise that the foreign subsidiary deduction increases the likelihood that a foreign corporation will be classified as an intangible corporation.

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[10] To date, there has been no legislative remedy to the constitutional flaws in G. L. c. 63, § 30 (8) and (9), identified by Perini Corp. v. Commissioner of Revenue, 419 Mass. 763, 768, cert. denied, 516 U.S. 822 (1995).

As an initial matter, the board appears to have been correct on the issue of standing. With respect to the five taxpayers that paid taxes as tangible property corporations, the parties stipulated that they would have been so classified under G. L. c. 63, § 30 (10), for all tax years at issue, irrespective of whether such classification had been determined according to the formula for domestic corporations or the formula for foreign corporations. Textron Inc., a foreign corporation and the only taxpayer who filed as an intangible property corporation, does not allege that its classification as an intangible property corporation was in any way affected by the application of the foreign subsidiary deduction.

It is even possible that the disparate treatment complained of may have conferred a benefit on Textron Inc.[11] See A.C. Bailey & W.G. Van Dorn, Taxation § 7:3, at 242-243 (4th ed. 2000) (foreign subsidiary deduction "increas[es] the instances in borderline cases where high-

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[11] Textron Inc. calculated its excise taxes as an intangible property corporation for all of the tax years at issue. It appears from the record, however, that, before the issuance of DD 99-1 (Jan. 4, 1999), 3 Official MassTax Guide at 657 (West 2001), Textron Inc. was converted into a tangible property corporation for the tax years 1990 and 1992, after the department's interpretation of this court's decision in Perini Corp. v. Commissioner of Revenue, supra, see note 10, supra, allowed the deduction of the value of all subsidiaries (no matter where the subsidiaries' place of incorporation) in assessing its classification under § 30 (10) and (11). Apparently the conversion to a tangible property corporation reduced the excise tax that Textron Inc. would have paid (had not the subsequent issuance of DD 99-1 further diminished its tax liability as an intangible property corporation) by a considerable amount.

networth foreign corporations with substantial 'investments' in corporations with no Massachusetts contacts will achieve tangible-property status, thereby likely incurring a lower property component of the excise than would be incurred under intangible-property status"). We arrive, nevertheless, at the virtually inescapable conclusion that none of the taxpayers was adversely affected by the disparate treatment and, thus, none may challenge these provisions. See Tax Equity Alliance for Mass. v. Commissioner of Revenue, 423 Mass. 708, 715-716 (1996). See also Doe v. The Governor, 381 Mass. 702, 704 (1980) ("only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of the government").[12]

2. What has been said above on the subject of standing applies as well to Textron's claim that the disparate treatment accorded to domestic and foreign corporations by the different calculations for taxable net worth contained in § 30 (8) and (9), impermissibly discriminates on

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[12] Textron's claim that the statutory remedy set forth in G. L. c. 63, § 52, automatically allows standing because, if successful in its claim, its tax burden will be significantly diminished, is circular and has no merit. A taxpayer who has not been harmed by the operation of a tax law may not challenge that law. See Tax Equity Alliance for Mass. v. Commissioner of Revenue, 423 Mass. 708, 715-716 (1996). That the statute provides a particular remedy in the event a taxpayer prevails on a claim that specific sections of the statute are unconstitutional does not automatically confer standing on all taxpayers who, although unaffected by the alleged unconstitutionality, would like to see the remedy invoked.

its face against foreign corporations in violation of the commerce clause. As the only intangible property corporation among the six taxpayers, only Textron Inc. could possibly have been affected by the different formulae for calculating the net worth measure. Further, because it was stipulated by the parties that the application of the directive resulted in its having zero taxable net worth for the tax years at issue, we know that even Textron Inc. was not adversely affected by the challenged provisions.

3. Putting these observations aside, for purposes of certainty and predictability of the corporate excise tax law, we shall assume standing, discuss briefly the merits of Textron's challenge, and proceed to approve the directive, which appears to have rendered any constitutional infirmities that may exist in § 30 (8) and (9), for all practical purposes, moot.

With respect to State taxation, a law that taxes a foreign corporation more heavily than a comparably situated domestic corporation is discriminatory against interstate commerce on its face and, usually, per se invalid. See Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996), and cases cited; Perini Corp. v. Commissioner of Revenue, supra at 767-769. As previously discussed, this court in Perini held unconstitutional under the commerce clause, the provisions of § 30 (8) and (9) that denied domestic corporations a deduction for investments in foreign subsidiaries, and foreign corporations a deduction for investments in domestic subsidiaries. The court determined that the effect of this tax scheme was to encourage single-State corporate structures and to penalize parent corporations that chose to cross State lines in order to acquire or create foreign subsidiaries. Id. at 770. "Such a scheme

clearly interferes with free trade among the States and cannot be considered consistent with the commerce clause." Id.

Even after the corrective surgery effected by the Perini case, the taxable net worth formulae for domestic and foreign corporations, as contained in § 30 (8) and (9), remain quite different. The calculation of a domestic corporation's taxable net worth under § 30 (8) is fairly straightforward and represents a conventional version of adjusted net worth, multiplied by an apportionment percentage.[13] A foreign corporation, under § 30 (9), must apply a far more complicated formula, in which its apportionment percentage is applied to net worth only indirectly.

What is unclear, however, is how the different formulae adversely affect foreign corporations (for example, by resulting in a higher taxable net worth than for a comparable domestic corporation) or impermissibly burden interstate commerce (for example, by discouraging foreign corporations from doing business in the Commonwealth, or domestic corporations from acquiring foreign subsidiaries). Although we are mindful that another taxpayer could show an impermissible burden, on this record, it is impossible to state with any certainty that the challenged provisions are unconstitutional under the commerce clause.

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[13] Each taxable corporation computes its own, separate income-apportionment percentage under G. L. c. 63, § 38, even when filing a combined return, as did Textron.

4. The commissioner's issuance of the directive has, at any rate, erased the effect of any constitutional infirmities that may exist in the different statutory formulae for calculating net worth contained in § 30 (8) and (9). As discussed above, the directive gives all corporations subject to the corporate excise tax, whether foreign or domestic, the option of taking the subsidiary deduction, or not, in determining its classification as a tangible or intangible property corporation under § 30 (10) and (11), and, if classified as an intangible property corporation, of applying either net worth formula designated for domestic or foreign corporations in § 30 (8) and (9). All taxpayers have the opportunity to pay the lowest excise tax that the relevant provisions can produce, and they may make a separate election each year choosing whichever subsections are most advantageous.

We reject Textron's assertion that the commissioner lacked the authority to promulgate the directive. A head of the agency charged with administering the corporate excise tax statutes, the commissioner has [illegible]rul discretion not to enforce a doubtful statute, or, as here, to interpret a statute in a manner that avoids potential constitutional issues. See Heckler v. Chaney, 470 U.S. 821, 831-832 (1985). The directive usurps no legislative prerogative; it safeguards the Legislature's taxing goals against assault by ensuring tax collection in a way that leaves the calculation and measure of the tax to the taxpayer's choice. We agree with the comment in one authority on State taxation that "[t]he [d]epartment's solution [in issuing the directive] was not only straightforward, but inspired." A.C. Bailey and W.G. Van Dorn, supra at § 6:2, at 154. By giving the corporate taxpayer

"its untrammeled choice of the best of available worlds, the commissioner has . . . fully carried out [this court's mandate in Perini] and . . . eliminated the [F]ederal constitutional issues presented." Id. at § 7:7, at 259. The directive does not rewrite the statute, but its application to a corporate taxpayer effectively severs the challenged provisions from the remainder of the statute. Cf. Commonwealth v. Chou, 433 Mass. 229, 238 (2001) (unconstitutional statutory provision may be struck, if doing so does not sacrifice integrity and purpose of remainder of statute). "Any of a variety of methods of curing an unconstitutional tax is permissible 'so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce.' " American Trucking Ass'ns v. Secretary of Admin., 415 Mass. 337, 350 (1993), quoting McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation of Fla., 496 U.S. 18, 41 (1990). See Fulton Corp. v. Faulkner, supra at 346-347 (States may fashion own remedies for State tax laws determined to be unconstitutional).[14]

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[14] Although unnecessary to the result, a few words are in order concerning Textron's primary goal in its determined efforts to have the challenged provisions of § 30 struck as unconstitutional – substantial abatements that would be forthcoming should this court apply the "repeal and revival" remedy set forth in G. L. c. 63, § 52. Textron's efforts are misplaced.

Under the unambiguous language of § 52, the "repeal and revival" remedy applies only in the event that certain sections of the corporate excise statutory scheme, namely §§ 32, 38C, 39, or 42B (the tax-imposing provisions), are declared unconstitutional. "If any part, section or subdivision of [§§ 30-42B]

Finally, we are not concerned that a successor commissioner may rescind or modify the directive, possibly, thereby, creating constitutional problems. As stated, the solution achieved by the directive embodies creative tax policy and enforcement in a way that moots constitutional concerns. If the directive undergoes change by a commissioner in a way that raises valid constitutional arguments, there will be time enough for this court to address the issues, assuming the Legislature has not otherwise acted preemptively.

5. The decision of the Appellate Tax Board is affirmed.

So ordered.

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other than [§§ 32, 38C, 39, or 42B] . . . shall be declared unconstitutional or inoperative, the remaining parts of [§§ 30-42B] shall not be affected thereby." G. L. c. 63, § 52. See Opinion of the Justices, 269 Mass. 611, 615-616 (1929). The Legislature's intent in enacting § 52 was to avoid the possibility that the basic statutory provisions imposing the new excise tax might be held unconstitutional, thus leaving the Commonwealth with no corporate excise tax law in effect. See id. at 617. This court has stated that § 52 is "not to be stretched to cover facts not within its fair meaning." W. & J. Sloane v. Commonwealth, 253 Mass. 529, 535 (1925). Accordingly, the "repeal and revival" remedy would not have been available to Textron, notwithstanding our decision today.

APPENDIX B

THE COMMONWEALTH OF MASSACHUSETTS

[LOGO] *Appellate Tax Board*

399 Washington Street

Boston, Massachusetts 02108

Docket Nos. F242168, F242193, F245676, F250551, F250552, F250553

AVCO RESEARCH LABORATORY, INC. ET AL,
Appellant.

COMMISSIONER OF REVENUE,
Appellee.

DECISION

With respect to **Textron Inc. v. Commissioner,** Docket No. F250551, in accordance with the Supplemental Stipulation of Facts (Sup. Stip ¶ 1.b.), filed by the parties on July 30, 1999, the decision is for the appellant. Abatement is granted in the amount of $36,355.00 in tax, plus all statutory additions.

With respect to **Textron Automotive Functional Components Inc. – McCord Winn Division v. Commissioner,** Docket No. F250553, in accordance with the Supplemental Stipulation of Facts (Sup. Stip ¶ 1.a.), the decision is for the appellant. Abatement is granted in the amount of $422,217.00 in tax, plus all statutory additions.

As to all other issues raised by the appellants in their petitions, the decisions are for the appellee.

APPELLATE TAX BOARD

By /s/ Abigail A. Burns Chairman.
/s/ Frank Scharaffa Member.
/s/ Donald [Illegible] Member.
/s/ Nancy T. [Illegible] Member.
Member.
Attest: [Illegible] B. Willis Clerk.

Date: APR 4 2000

(Seal)

NOTICE: An appeal may be taken to the Massachusetts Appeals Court by either party to these proceedings. A claim of appeal should be filed with this Board in accordance with the Massachusetts Rules of Appellate Procedure.

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

AVCO RESEARCH LABORATORY, INC., v. COMMISSIONER OF REVENUE
AVCO CORPORATION,
TURBINE ENGINE COMPONENTS TEXTRON (NEWINGTON OPERATIONS) INC.
(f.k.a. Babco Textron Inc.),
TEXTRON, INC.,
TEXTRON FINANCIAL CORPORATION,
TEXTRON AUTOMOTIVE FUNCIONTAL [sic] COMPONENTS INC. – McCORD WINN DIVISION

Docket Nos. F242168
F242193
F245676
F250551
F250552
F250553

Promulgated:
October 12, 2000

These are appeals under the formal procedure pursuant to G.L. c. 62C, § 39, from the refusal of the appellee to abate corporate excises assessed against the appellants under G.L. c. 63, § 38 for tax years 1990, 1991 and 1992.

Commissioner Scharaffa heard these appeals and was joined in the decision for the appellee by Chairman Burns and Commissioner Gorton.

These findings of fact and report are made at the request of the appellant and the appellee pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

Paul H. Frankel, Esq., Michael A. Pearl, Esq. and *Maxwell D. Solet, Esq.* for the appellant.

Harvey M. Pullman, Esq. and *Steven A. Remsberg, Esq.* for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of a stipulation of facts, a supplemental stipulation of facts, and testimony and exhibits introduced in the hearings of these appeals, the Appellate Tax Board ("Board") made the following findings of fact. The six appellants in these appeals are members of a federal consolidated corporate group ("Textron Group") which filed Massachusetts combined corporate excise returns for tax years 1990 through 1992. Textron, Inc. ("Textron") is the principal reporting corporation for this controlled group. Textron is a multistate corporation involved in the business of aerospace technology and the manufacture of commercial products. Textron's principal place of business and commercial domicile is Providence, Rhode Island. Four of the corporations in the combined group,

Avco Corporation ("Avco"), Avco Research Laboratory, Inc. ("Avco Research"), Textron Financial Corporation ("Textron Financial") and Textron are incorporated in states other than Massachusetts ("foreign" corporations), and two of the corporations, Babco Corporation ("Babco") and Textron Automotive Functional Components Inc. – McCord Winn Division ("McCord Winn"), are Massachusetts corporations ("domestic" corporations).

On July 7, 1996, the Commissioner of the Department of Revenue ("the Commissioner") issued Notices of Intent to Assess ("NIA") to various members of the Textron Group. On September 25, 1996, the Commissioner issued a Notice of Assessment ("NOA") indicating that additional corporate excises had been assessed on September 24, 1996, against Avco, Turbine Engine Components Textron and McCord Winn. On October 8, 1996, Textron filed an application for abatement of $1,328,248 in corporate excises plus interest and penalties for the Textron Group for the tax years at issue. Textron indicated on this application the Textron Group's consent to the Commissioner's failure to act on its application prior to six months from the filing date.

On April 22, 1997, the Commissioner sent a notice of abatement denial to Avco Research. On April 24, 1997, the Commissioner sent a notice of abatement denial to Avco. On September 29, 1997, the Commissioner sent a notice of abatement denial to Babco. On August 4, 1998, Textron filed a withdrawal of consent as to the Commissioner's failure to act on the abatement claims for the remaining members of the Textron Group that have requested abatements – McCord Winn, Textron and Textron Financial. As

a result of such withdrawal, the October 8, 1996 application for abatement is deemed to be denied in its entirety as of August 4, 1998, pursuant to G.L. c. 58A, § 6. The appellants filed their appeals with the Board on the following dates: F242168 on June 12, 1997; F242193 on June 12, 1997; F245676 on November 4, 1997; F250551 on August 4, 1998; F250552 on August 4, 1998; and F250553 on August 4, 1998. On the basis of the foregoing, the Board found it had jurisdiction to hear each of these appeals.

Prior to the hearing of these appeals, the Commissioner agreed to abate the amount of $422,217, exclusive of statutory additions, attributable to the inclusion in the numerator of McCord Winn's Massachusetts sales factor of certain sales pursuant to the "throw back" rule under G.L. c. 63, § 38. Accordingly, the only issue on appeal is the constitutionality of certain provisions of the corporate excise which relate to the non-income measure of the excise.

As to Textron, the Commissioner conceded, and the parties agreed to remove from consideration by the Board for the tax years at issue, $36,355, exclusive of statutory additions, as a result of the Commissioner's application of Department of Revenue ("DOR") Directive 99-1 ("DD 99-1"), in conjunction with Technical Information Release 99-3 ("TIR 99-3"), for the tax years at issue. However, the Commissioner denied or is deemed to have denied a portion of the abatement claims filed by the Textron Group which would apply the provisions of the "repeal and revival" remedy contained in G. L. c. 63, § 52 to each of the appellants. The amount of corporate excises

remaining in dispute was stipulated to be $869,675, exclusive of statutory additions.

At issue in these appeals is the constitutionality of certain portions of the corporate excise statute. The six appellants challenge the definitional provisions of G.L. c. 63, § 30(10) and (11), which define "tangible property corporation" and "intangible property corporation, and § 30(8) and (9), which calculate the net worth portion of the excise for domestic intangible property corporations and the net worth portion of the excise for foreign intangible property corporations, respectively. These definitions are used as part of the computation of the corporate excise imposed by G.L. c. 63, §§ 32, 38C, 39 and 42B.

For each tax year at issue, all of the appellants except Textron paid excises as tangible property corporations, either foreign or domestic, as defined under G. L. c. 63, § 30(10).Textron paid excises as a foreign intangible property corporation, as defined under G. L. c. 63, § 30(11). All parties stipulated that the six appellants filed their returns and claimed the tangible or intangible property corporation status in accordance with the proper application of the rules provided in G.L. c. 63, § 30(10) and § 30(11).

The parties also stipulated that the five tangible property corporations would all have been classified as tangible property corporations, irrespective of the foreign subsidiary deduction in G.L. c. 63, § 30(10) and (11) at issue in these appeals. As to the appellant Textron, the parties stipulated that application of DD 99-1 resulted in Textron having no tax liability under the non-income measure of the corporate excise in each of the tax years at

issue. Therefore, in the matter of ***Textron Inc. v. Commissioner***, F250551, the decision was for the appellant in accordance with the Supplemental Stipulation of Facts filed by the parties. Abatement was granted in the amount of $36,355.00 plus all statutory additions.

In the remaining appeals, the decision was for the appellee. For the reasons stated in the Opinion, the Board found that all the appellants lacked standing to challenge the constitutionality of § 30(10) and (11). The Board found that appellant Textron did have standing to challenge the constitutionality of § 30(8) and (9). However, the Board found that § 30(8) and (9) are not unconstitutional, but rather, for the reasons stated in the Opinion which follows, these provisions are constitutional because they serve a legitimate state interest.

OPINION

The sole issue raised by these appellants was whether four definitional provisions in § 30 violate the Commerce Clause of the United States Constitution, such that the entire corporate excise structure should be abandoned in favor of the prior version of the law in effect until 1919. Under the current version of the statute, domestic and foreign corporations that do business in the Commonwealth are required to pay an excise based in part on a percentage of their net income and in part on a percentage of their property. G.L. c. 63, §§ 32, 39. The property, or non-income, portion of the excise is measured by a corporation's tangible property, if the corporation is a tangible property corporation, or by its net

worth, if the corporation is an intangible property corporation. *Id.* The definitions for "tangible property corporation" and "intangible property corporation" are set forth in G.L. c. 63, § 30(10) and § 30(11), respectively. The calculation of the excise for domestic and foreign tangible property corporations is set forth in G. L. c. 63, § 30(7). The calculation of the excise on net worth for domestic and foreign intangible property corporations is set forth in G.L. c. 63, § 30(8) and § 30(9), respectively.

I. Background

In *Perini Corporation v. Commissioner of Revenue,* 419 Mass. 763, *cert. denied,* 516 U.S. 822 (1995), the Supreme Judicial Court addressed the constitutionality of two deductions used in computing the taxable net worth of an intangible property corporation, one for a domestic corporation, found at § 30(8), and one for a foreign corporation, found at § 30(9). The challenged provisions allowed a domestic intangible corporation to deduct from its taxable net worth the value of a subsidiary of which it owned 80% or more of its voting stock, if that subsidiary was incorporated in Massachusetts. *Perini,* 419 Mass. at 764. Foreign intangible corporations were also allowed a deduction from their taxable net worth for the value of a subsidiary of which it owned 80% of more of the voting stock, but only if that subsidiary was incorporated outside of Massachusetts. *Id.*

The Supreme Judicial Court found that the challenged deductions facially discriminated against interstate commerce in violation of the Commerce Clause of the United States Constitution. "This provision draws a

distinction solely on the basis of the domicil of the subsidiary . . . " *Id.* at 768. The court compared similarly-situated taxpayers, and discovered distinctions based solely on domicile. *Id.* at 769 (*quoting* ***Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.***, 505 U.S. 71, 80 n.23 ("In considering claims of discriminatory taxation under the Commerce Clause . . . it is necessary to compare the taxpayers who are 'most similarly situated.' ")) Domestic parent corporations were treated differently based on the domicile of their subsidiaries, creating an incentive for domestic corporations to acquire in-state subsidiaries and a burden for domestic corporations that crossed state lines to acquire foreign subsidiaries. *Id.* at 768. Furthermore, the provisions treated foreign corporations less favorably than similarly-situated domestic corporations, allowing a deduction for a domestic corporation that acquires a domestic subsidiary, but not for a foreign corporation that acquires a domestic subsidiary. *Id.* at 769. The court thus found the deductions to violate the Commerce Clause, because "[u]nder § 30(8) and (9), only those corporate structures which are exclusively domestic or exclusively foreign are given a deduction . . . . Thus, the effect of this taxing scheme is to encourage single-State corporate structures and to penalize parent corporations that choose to cross State lines in order to acquire or create foreign subsidiaries." *Id.* at 770.

Having declared that the challenged deductions violated the Commerce Clause, the Supreme Judicial Court was left to fashion a remedy for the taxpayer in *Perini*. Accordingly, Associate Justice Wilkins made the Recommendation Concerning Final Judgment To Be Entered (Wilkins, J.), SJC Docket No. 93-393, (entered May 13,

1996) (*"Perini II"*). In his Order, Justice Wilkins examined the available remedies, including those contained in G.L. c. 63, § 52. Section 52 provides three separate remedies in the event that certain sections or subdivisions of the corporate excise statute are declared unconstitutional or inoperative. The first remedy applies "[i]f the provisions of section thirty-two imposing an excise on domestic business corporations . . . are declared unconstitutional or inoperative by a final judgment, order or decree of the supreme court of the United States or of the supreme judicial court of the commonwealth." In this event, the offending portion shall be rendered "null and void," and "all laws applicable to domestic business corporations . . . which were repealed or were made inoperative as to, or inapplicable to, such corporations by chapter three hundred and fifty-five of the General Acts of nineteen hundred and nineteen shall thereupon be revived and become operative." This remedy is known as "repeal and revival." The second parallel remedy applies if a portion of § 39 imposing an excise on foreign business corporations is "declared unconstitutional or inoperative by a final judgment, order or decree of the supreme court of the United States or of the supreme judicial court of the commonwealth." Repeal and revival likewise applies in this situation. The third remedy applies if any other part, section or subdivision of §§ 30 through 42B inclusive, other than those sections imposing an excise (§§ 32, 38C, 39 or 42B) is declared unconstitutional or inoperative. In this situation, severability applies, meaning that the remaining parts of §§ 30 through 42B, inclusive, "shall not be affected thereby."

Justice Wilkins viewed the repeal and revival provision as an overly drastic measure where the Supreme Judicial Court declared a single deduction to be unconstitutional and not §§ 32, 38C, 39 or 42B: "Certainly severability is warranted in the circumstances, and the entire scheme need not be thrown out." *Id.* at 3 (*citing* G.L. c. 63, § 52 and G.L. c. 4, § 5). Justice Wilkins, therefore, opted for a "surgical procedure" striking the unconstitutional language pertaining to the location of the subsidiaries in § 30(8) and (9). As a result, all corporations, both domestic and foreign, now receive a deduction for their investments in subsidiaries, both domestic or foreign, in which they owned at least an eighty-percent interest. *Perini II* at 7-8.

II. Appellants' Arguments

At issue in these appeals is the constitutionality of the corporate excise statute as a whole, due to alleged constitutional flaws in the definitional section, G.L. c. 63, § 30. Paragraphs (10) and (11) provide two formulas for the determination of whether a corporation is a tangible or an intangible property corporation, depending on whether the corporation is domestic or foreign. If a corporation is determined to be an intangible property corporation, paragraphs (8) and (9) provide two formulas for the calculation of that corporation's non-income portion of the excise, depending on whether the corporation is domestic or foreign. The appellants' argument is that these definitional sections are constitutionally defective in two respects. First, they allege that paragraphs (10) and (11) are unconstitutional or inoperative, because

these provisions provide a deduction to foreign corporations for their investments in subsidiaries not doing business in Massachusetts. This deduction, they allege, by reducing the tangible property of a corporation, tends to make it more likely for a foreign corporation to be classified as an intangible property corporation than a similarly-situated domestic corporation. Therefore, the appellants allege, these provisions violate the Commerce Clause, because they treat domestic and foreign corporations differently.

The appellants' second argument is that paragraphs (8) and (9), providing the formulas for the calculation of the excise on the net worth of domestic and foreign intangible property corporations, respectively, are unconstitutional or inoperative, because they apply less favorably to foreign corporations than they do to domestic corporations. After ***Perini II,*** the deduction for investments in eighty percent owned subsidiaries applies to both foreign and domestic corporations without any references to the domicile of the subsidiary or the parent corporation. However, the appellants allege that, even after ***Perini II,*** these provisions apply differently to foreign corporations than to their domestic counterparts. The deduction, they allege, is applied directly to reduce a domestic corporation's net worth measure. However, because it is applied in conjunction with an apportionment factor to a foreign corporation, they allege that the deduction applies only indirectly to a foreign corporation's net worth measure in calculating the non-income portion of the corporate excise.

As a result of these perceived defects in the definitional section, the appellants allege that those provisions

actually imposing the excise on domestic and foreign corporations, §§ 32 and 39, respectively, are so tainted as to render the entire corporate excise statute unconstitutional or inoperative. They argue, therefore, that the Board must invoke the repeal and revival provision of G.L. c. 63, § 52, thereby granting an abatement of excise to the level which would have been imposed under the prior version of the corporate excise statute in effect until 1919.[1]

For the reasons explained below, the Board dismissed the appellants' challenges to the non-income portion of the Massachusetts corporate excise.

III. Challenges to § 30(10) and (11) – classification provisions

First, the Board found that all appellants lacked standing to challenge paragraphs (10) and (11). It is a fundamental principle of constitutional law that a court cannot entertain an action challenging the constitutionality of a statute unless the challenging party has "legal standing" to maintain such an action. *See* ***Franklin P. Horton & others v. Attorney General & The Secretary***

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[1] The corporate franchise tax as originally enacted and then amended in 1865 did not have any maximum or minimum limitation. The Business Corporation Law of 1903 inserted maximum and minimum limitations. The tax on any corporation was not to exceed by more than twenty percent a tax on the tangible property and taxable securities of the corporation calculated at the same rate. In no event was the excise on foreign corporations to exceed $2,000 annually. Appellants estimated that the combined total excise liability for all six appellants for the three-year period at issue was $6,915.00

of the Commonwealth, 269 Mass. 503, 513-14 (1929) ("Only those directly affected as to some personal interest by the operation of a statute can question its validity"). Courts in the Commonwealth strictly adhere to the standing requirement, viewing the issue as intrinsic to the delicate separation of powers among the branches of government: "From an early day it has been an established principle in this Commonwealth that only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of the government." ***Jane Doe & others v. The Governor & others,*** 381 Mass. 702, 704 (1980) (*quoting* ***Kaplan v. Bowker,*** 333 Mass 455, 459 (1956)). For this reason, "[t]he issue of "standing" is closely related to the question of whether an "actual controversy" exists, and [the Supreme Judicial Court] ha[s] treated it as an issue of subject matter jurisdiction." ***Doe,*** 381 Mass. at 705 (*citing* ***Department of Community Affairs v. Massachusetts State College Bldg. Auth.,*** 378 Mass. 418, 422-23 (1979)).

The Board agreed with the Commissioner that none of the six appellants could establish any actual harm by the operation of the classification provisions in § 30(10) and (11). With respect to the five appellants which were classified as tangible property corporations, the parties stipulated that "regardless of whether [each of these five appellants] were to utilize the formula for domestic corporations or the formula for foreign corporations, for all tax years at issue, [each appellant] would fall within the definition of and be classified as a tangible property corporation under G.L. c. 63, § 30(10), and be taxed on the

value of its tangible property determined under G.L. c. 63, § 30(7)." Therefore, the Board agreed with the Commissioner's assertion that "since their classification status is in no way dependent upon or affected by the statutory provisions that they allege are unconstitutional, the alleged unconstitutionality has no adverse impact on them."

The intangible property corporation, Textron, also lacks standing to challenge paragraphs (10) and (11), because the challenged deduction in no way harmed Textron. The Board found that Textron failed to prove that, for all tax years at issue, Textron would be classified as anything other than an intangible property corporation under § 30(11), regardless of the deduction for investments in foreign subsidiaries. Therefore, the existence and application of this deduction had no effect on Textron for any of the tax years at issue. However, as discussed in part IV of this Opinion, Textron did have standing to challenge paragraphs (8) and (9) of § 30.

Second, the statute as written in paragraphs (10) and (11) authorizes the Commissioner to use discretion in classifying corporations as tangible or intangible. After setting forth the general definition of a tangible property corporation, § 30(10) adds to this "or a corporation, which, in the judgment of the commissioner, should be so classified." Section 30(11) adds this same discretionary language to the definition of an intangible property corporation. Therefore, the Commissioner is authorized by statute to depart from the classification formula for foreign and domestic corporations where in his discretion he believes a corporation "should be so classified" as either

tangible or intangible. Such discretion was properly exercised where the Commissioner, with the benefit of judicial guidance from *Perini*, believed that a potential constitutional issue was present in these sections. *See* ***Consolidated Cigar Corporation v. Dept. of Public Health,*** 372 Mass. 844, 850-54 (1977) (court gives considerable leeway to a Massachusetts agency in interpreting a statute it is charged with enforcing); ***School Committee of Springfield v. Board of Education,*** 362 Mass. 417, 441 n.22 (1972) ("weight should be given" to reasonable construction of a statute adopted by the agency charged with its enforcement); *see also* ***Train v. Natural Resources Defense Council,*** 421 U.S. 60, 87 (1975) (same result with respect to federal agency). In light of this factor, and more importantly, in light of ***Perini*** and ***Perini II,*** it was appropriate for the Commissioner to allow corporations to choose whether to use the formula in § 30(10) or (11) whether they are domestic or foreign pursuant to DD 99-1.

Third, the Board also found that none of the appellants presented evidence proving that the provisions in c. 63, § 30(10) and (11) work to the advantage of a domestic corporation and to the disadvantage of a foreign corporation. In striking the language in ***Perini,*** the Supreme Judicial Court noted that the challenged provisions in § 30(8) and (9) discriminated against interstate commerce because they resulted in a benefit to domestic intangible property corporations that acquired domestic subsidiaries, and a burden to foreign intangible property corporations and to domestic intangible property corporations that acquired foreign subsidiaries. ***Perini,*** 419 Mass. at 768-69 (*citing, inter alia,* ***West Lynn Creamery, Inc. v. Healy,*** 114 S.Ct. 2205, 2212, 2214 (1994) (Massachusetts

pricing order which effectively benefited in-State economic interests by burdening out-of-State competitors held to be unconstitutional in violation of Commerce Clause). Accordingly, the Board found that none of the appellants in these appeals met their burden of proving that the provisions in § 30(10) and (11) work to the advantage of domestic corporations and to the disadvantage of foreign corporations; therefore, the Board did not find that paragraphs (10) and (11) discriminated against interstate commerce in violation of the Commerce Clause.

Finally, an additional consideration is that the challenged deductions in § 30(10) and (11) serve a legitimate state interest that cannot be served adequately by reasonable nondiscriminatory alternatives. *See* ***Perini***, 419 Mass. at 771. This legitimate interest is avoidance of a constitutional violation in the Commonwealth's taxing provisions. The challenged deductions available to foreign corporations in § 30(10) and (11) insures that a foreign corporation's investments in foreign subsidiaries not doing business in Massachusetts will not be a factor that determines its classification as either a tangible or an intangible property corporation. It is a well-established constitutional principle that a State may not tax the worldwide income of an out-of-state corporation. *See* ***Allied-Signal, Inc. v. Director, Div. of Taxation***, 504 U.S. 768, 777 (1992) ("The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax') (*quoting* ***Miller Brothers, Co. v. Maryland***, 347 U.S. 340, 344-45 (1954)). Likewise, the

Supreme Judicial Court has noted that the inclusion in the Commonwealth's taxing provision of a foreign corporation's investments in other foreign corporations not doing business in the Commonwealth would likely be unconstitutional. *Perini*, 419 Mass. at 771, n. 8; *Perini II* at 4-6. Moreover, the deduction is narrowly drawn so as to eliminate that portion of the foreign corporation's investments – those investments in foreign subsidiaries not doing business in the Commonwealth – which would create a constitutional violation. The avoidance of a constitutional violation in its taxing provisions, therefore, advances a legitimate local purpose and is narrowly drawn to accomplish that legitimate purpose.

For all the reasons stated above, the Board found for the Commissioner on the issue of the constitutional challenge to § 30(10) and (11).

IV. Challenges to § 30(8) and (9) – net worth calculations

First, it is apparent that all appellants except Textron lack standing to challenge the net worth provisions in § 30(8) and (9). Only Textron was an intangible property corporation, so only Textron could actually use either of these provisions to calculate the non-income measure of its corporate excise. *See* G. L. c. 63, § 30(8) and (9). The other five corporations, as tangible property corporations, calculated the non-income measure of the corporate excise under the provisions of § 30(7).

Thus, the only appellant with potential standing to challenge § 30(8) and (9) is the one intangible property corporation, Textron. The Board found that Textron had

standing notwithstanding the Commissioner's issuance of DD 99-1. The United States Supreme Court has held that voluntary cessation of an action may not necessarily moot a judicial suit to challenge that action. *See* ***United States v. Concentrated Phosphate Export Ass'n***, 393 U.S. 199, 203 (1968). Moreover, the DOR's unilateral issuance of a directive such as DD 99-1 may not be a sufficiently final discontinuance of a challenged behavior, such as the legislative change of a statute, to guarantee that the challenged activity could not reoccur. *See* Laurence H. Tribe, American Constitutional Law, 3d. ed. (2000) at 355-56 (*citing* ***United States v. Chesapeake & Potomac Co. of Virginia***, 516 U.S. 415 (1996) (per curiam). Furthermore, Massachusetts courts traditionally choose to adjudicate claims even if they are technically moot if the issue raised is one of importance and capable of avoiding review. *See* **Mendoza v. Commonwealth**, 432 Mass. 771, 777 (1996) ("[I]t is entirely appropriate that we proceed to adjudicate both claims" where "[T]he issues are certainly of recurring importance to the administration of justice in the Commonwealth, yet . . . they would almost certainly evade review in this court").

However, the Board found that the challenged provisions in § 30(8) and (9) are not unconstitutionally discriminatory. Textron's argument is that, because an apportionment factor is applied to a foreign corporation's net worth, the deduction for eighty percent owned subsidiaries will apply indirectly to reduce a foreign corporation's net worth. Yet, they argue, the eighty percent owned subsidiary deduction will directly reduce a domestic corporation's net worth, because there is no

apportionment factor applied to the domestic corporation. Appellant's argument, therefore, stems from the statute's use of an apportionment factor to calculate the net worth portion of the excise of a foreign corporation. However, the use of an apportionment formula is a basic precept to the corporate excise. "[T]he entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs." ***Mobil Oil Corp. v. Comm'r of Taxes***, 445 U.S. 425, 436 (1980) (*quoting* ***Northwestern States Portland Cement Co. v. Minnesota***, 358 U.S. 450, 460 (1959)). Latitude is accorded to a State in approximating the value of the intrastate operations which it may fairly tax. *See* ***Moorman Manufacturing Co. v. Bair***, 437 U.S. 267, 273 (1978) ("the Court has refused to impose strict constitutional restraints on a State's selection of a particular formula" for calculating corporate excise on intrastate corporate activity). "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed." ***Butler Bros. V. McColgan***, 315 U.S. 501, 507 (1942) (*citing* ***Norfolk & Western Ry. Co. v. North Carolina***, 297 U.S. 682, 688 (1968)).

Textron did not meet this "clear and cogent" evidence standard. Under § 30(0), the apportionment factor is not just applied to the deduction, but to the entire net worth amount. The Commonwealth must apply an apportionment factor in calculating a foreign corporation's excise, because a State cannot within the boundaries the

Constitution tax extraterritorial income of a foreign corporation. *See* ***Allied-Signal, supra***. Because the Commonwealth can tax only a portion of a foreign intangible property corporation's net worth, it follows that such a corporation should receive only a corresponding portion of the deduction used to arrive at that net worth amount. *See* ***Butler Bros.***, 315 U.S. at 506 (a statute "calling for a method of apportionment which is 'fairly calculated' to assign to a State 'that portion of the net income 'reasonably attributable' to the business done there" will put any constitutional question under the Fourteenth Amendment "at an end") (citations omitted). Therefore, while the use of the apportionment factor in § 30(9) may result in foreign corporations receiving the eighty percent subsidiary deduction indirectly, the apportionment factor nonetheless serves a legitimate state interest, which is the avoidance of taxing extraterritorial income. *See* ***Allied-Signal, supra***. Therefore, the provisions of § 30(9) withstand Textron's constitutional challenge.

Even if the Board were to find that paragraphs (8) and (9) were unconstitutional, the Board could not grant Textron the remedy it sought, namely, the repeal and revival remedy in § 52. For the reasons stated below, the conditions for the application of the repeal and revival remedy were not met in these appeals.

In order for the repeal and revival provisions in § 52 to apply, one of the sections of G.L. c. 63, §§ 32, 38C, 39 or 42B, those sections actually imposing the excise, must have been declared unconstitutional or inoperative by a final judgment, order or decree of the United States Supreme Court or the Supreme Judicial Court of Massachusetts. This prerequisite has not been met under the

facts of these appeals for two reasons. First, the challenged portions of the statute are confined to four definitions in § 30; they do not impugn §§ 32, 38C, 39 or 42B, the provisions of the statute imposing the excise on domestic and foreign corporations. Second, there has been no United States Supreme Court case, nor a Supreme Judicial Court of Massachusetts case, that has declared by final judgment, order or decree that any of the provisions of G.L. c. 63, §§ 32, 38C, 39 or 42B imposing an excise on corporations are unconstitutional or inoperative. Because neither of the requirements of the § 52 repeal and revival remedy has been met, the Board would be statutorily unable to grant the remedy sought by the appellants. *See* ***W. & J. Sloan v. Commissioner,*** 253 Mass. 529, (1925) ("Doubtless section 52 is remedial and should be given an interpretation to effectuate its intent. But it is not to be stretched to cover facts not within its fair meaning").

Furthermore, as in ***Perini*** and ***Perini II,*** the repeal and revival remedy of G.L. c. 63, § 52 would not apply to the provisions that Textron challenged. Textron's challenge to § 30(8) and (9) is similar to the challenge to those same portions addressed in ***Perini*** and ***Perini II,*** namely the constitutionality of a net worth calculation that applies different deductions to corporations depending on whether they are foreign or domestic. Justice Wilkins began his Order with the premise that repeal and revival is too harsh for challenges of deductions contained in the definitional section of § 30. Instead, the severability remedy would apply to eradicate any unconstitutional or inoperative provisions from the statute. ***Perini II*** at 3; *see also* ***Opinion of the Justices to the Governor and Council,***

269 Mass. 611, 617 (1929) (in addressing whether repeal and revival remedy should apply to unconstitutional defect of a single deduction in G.L. c. 63, § 30(5): "That is too violent an inference or construction to be warranted") (*citing* ***Truax v. Corrigan***, 257 U.S. 312, 341, 342 (1921). Therefore, even if an appropriate court or this Board were to agree with Textron and find that the net worth provisions provide an unconstitutional advantage to domestic taxpayers, ***Perini II*** makes clear that severability, and not repeal and revival, would be the proper remedy for addressing constitutional defects in deductions contained in the definitional provisions of § 30. *See also* ***Opinion of the Justices***, 269 Mass at 617 ("We do not think that the words of [§ 52] disclose an intention that the section shall take effect in the circumstances here disclosed. The main design of the excise law as set forth in G.L. c. 63, § 32, has not been declared unconstitutional"). Therefore, if any of the definitional provisions of § 30 were declared unconstitutional or inoperative, a "surgical procedure" similar to that utilized in ***Perini II*** would be used in accordance with the last sentence of § 52. It is an accepted judicial tenet that, where there is an unconstitutional provision in a statute, a court will try to eradicate the defect whenever possible rather than expunge the statute as a whole. *See* ***Boston Gas Co. v. Department of Public Utilities***, 387 Mass. 531, 540 (1982) ("When a court is compelled to pass upon the constitutionality of a statute and is obliged to declare part of it unconstitutional, the court, as far as possible, will hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without

the valid part"). *See also* ***Massachusetts Wholesalers of Malt Beverages, Inc. v. Commonwealth***, 414 Mass. 411 (1993) (court strikes amendment to bottle law creating retroactive funding, thereby saving the remainder of the statute).

Moreover, Textron was not treated differently based on its status as a foreign corporation. Pursuant to DD 99-1 and TIR 99-3, Textron was allowed to choose either the domestic or foreign corporation formula for determining net worth, irrespective of the place of the corporation's domicile. The Commissioner, relying on ***Perini*** and ***Perini II***, issued DD 99-1 in an attempt to avoid further constitutional challenges. This directive allows both foreign and domestic corporate taxpayers to choose between the two formulas for calculating their net worth measure, either § 30(8) or (9), such election to be made anew for each tax year. Pursuant to TIR 99-3, the Commissioner authorized the elections of DD 99-1 to be available both prospectively and retroactively. Therefore, for all tax years at issue, Textron was entitled to choose whether to be taxed on its net worth as either a foreign or a domestic corporation. As stipulated by the parties, treatment of Textron as a domestic intangible property corporation in each of the tax years at issue would result in Textron having no tax liability under the non-income measure of the corporate excise. Therefore, the statutory scheme as enforced by the Commissioner treated Textron no differently than a similarly-situated domestic intangible property corporation.

Appellants argue that the Commissioner misplaced the authority to prevent an unconstitutional result by promulgating a directive and technical information. The Board agrees with the appellants that the Commissioner's

authority to assess taxes must be derived from statute. *See* ***Commissioner v. AMIWoodbroke, Inc.***, 418 Mass. 92 (1994), ***Commissioner of Revenue v. Marr Scaffolding***, 414 Mass. 489, 493 (1993), ***Polaroid Corp. v. Commissioner of Revenue***, 393 Mass. 490, 472 (1984) ***Chateau deVille***, 11 Mass. App. Tax Bd. Rep. 102, 107 (1989). However, as the head of the agency charged with enforcing the corporate excise statutes, the Commissioner has the discretion not to enforce a statute, especially if in his expertise he believes the statute as written poses a constitutional problem. *See* ***Heckler v. Chaney***, 470 U.S. 821 (1985) (an agency's decision to refrain from enforcing a statute under particular circumstances involves "a complicated balancing of a number of factors which are peculiarly within its expertise"). While the Board found the challenged provisions to be constitutional, it also found that the Commissioner was within his authority, as the head of the agency charged with administering the tax laws, to apply the statutes in a manner which avoided what he perceived to be a potential constitutional issue. The Commissioner was authorized to apply the statute in light of the judicial guidance given in ***Perini*** and ***Perini II***. Because DD 99-1 removes the distinction based on domicile of the corporations for purposes of calculating an intangible property corporation's net worth, DD 99-1 is a reasonable interpretation of what the Supreme Judicial Court did in ***Perini*** and ***Perini II*** with respect to other parts of the same section, and resolves all ambiguities arising after ***Perini*** and ***Perini II*** in favor of the taxpayer, as is required under Massachusetts law. "It is a familiar principle that tax laws are to be strictly construed. The right to tax must be plainly conferred by the statute. It is not to be implied. Doubts are resolved in favor of the

taxpayer." ***Eaton, Crane & Pike Co.*** v. ***Commonwealth***, 237 Mass. 523, 530. *See also*, ***Cabot*** v. ***Commissioner of Corp. & Tax.***, 267 Mass. 338, 340 (1929), ***State Tax Commission v. Gray***, 340 Mass. 535, 541 (1960).

Moreover, DD 99-1 refrains from rewriting the statute; it follows the exact computational provisions as written by the Legislature, but implements these provisions by enabling taxpayers to choose their net worth excise liability irrespective of their domicile. The result is that the calculations as written by the Legislature remain intact, but the implementation allows the Commissioner to avoid what he perceives to be a potential constitutional issue in light of his agency's reasonable interpretation of ***Perini*** and ***Perini II***. DD 99-1 is therefore consistent with the Supreme Court's decision in ***Cheney***, which allows discretion in the agency charged with enforcing a particular statute.

Based on the foregoing, the Board accordingly issued a decision for the appellant in F250551 as a result of the application of DD 99-1 and TIR 99-3, in accordance with the Supplemental Stipulation of Facts filed by the parties. Abatement was granted in the amount of $36,355.00 plus all statutory additions. With respect to the remaining appeals, the Board issued decisions for the appellee.

THE APPELLATE TAX BOARD

By: /s/ Abigail A. Burns
Abigail A. Burns, Chairman

A true copy:

Attest: /s/ Helen Mary Warren
Asst. Clerk of the Board

APPENDIX C

Mass. Gen. Laws ch. 63, § 30. Business corporations; definitions; value of tangible property; net worth.

Section 30. When used in this section and sections thirty-one to fifty-two, inclusive, the following terms shall have the following meanings:

1. "Domestic corporations", every corporation organized under or subject to chapter one hundred and fifty-six, chapter one hundred and fifty-six A, chapter one hundred and fifty-six B or chapter one hundred and eighty which has privileges, powers, rights or immunities not possessed by individuals or partnerships; provided, however, that said term shall not apply to corporations organized under the provisions of section ten of chapter one hundred and fifty-seven, domestic manufacturing corporations as defined in section thirty-eight C or corporations exempt from taxation under the provisions of section five hundred and one of the federal Internal Revenue Code, as amended and in effect for the taxable year. A mutual holding company subject to chapter one hundred and sixty-seven H shall also be considered to be a corporation that is a domestic corporation for purposes of this chapter.

2. "Foreign corporations", every corporation, association, or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under chapter one hundred and fifty-six, chapter one hundred and fifty-six A, chapter one hundred and fifty-six B, or chapter one hundred and eighty which has privileges, powers, rights

or immunities not possessed by individuals or partnerships; provided, however, that said term shall not apply to such corporations, associations or organizations without capital stock as are subject to taxation under section eighteen of chapter one hundred and fifty-seven to foreign manufacturing corporations as defined in section forty-two B or to such corporations, associations or organizations as are exempt from taxation under the provisions of section five hundred and one of the federal Internal Revenue Code, as amended and in effect for the taxable year.

* * *

7. The value of a corporation's tangible property taxable under clause (1) of subsection (a) of section thirty-two or thirty-nine shall be the book value of such of its tangible property situated in the commonwealth on the last day of the taxable year as is not subject to local taxation nor taxable under section sixty-seven. For purposes of this paragraph, "book value" means the original cost of such property, less the depreciation or amortization taken against such property on the books of the corporation maintained for making financial reports to shareholders. If the commissioner finds that a corporation has transferred its tangible property under clause (1) of subsection (a) of section thirty-two or thirty-nine for the purpose of reducing its excise under this chapter, he may determine the amount of its tangible property taxable under said section on the basis of the average of such tangible property held during the taxable year.

8. The net worth of a domestic business corporation taxable under clause (1) of subsection (a) of section thirty-two shall be such portion of the book value of its total assets on the last day of the taxable year, less the sum of (1) its liabilities on said date, (2) the book value of its tangible property situated in the commonwealth on said date and subject to local taxation, less the interest of any mortgagee therein, and (3) the book value on said date of its investment in subsidiary corporations organized in the commonwealth which represent eighty per cent or more of the voting stock of said corporations, as shall be found by multiplying said amount by such corporation's income apportionment percentage, as determined under the provisions of section thirty-eight. In determining the book value of any asset, the commissioner may disallow any reserve, in whole or in part, established with respect thereto which, in his judgment, is not reasonable and proper.

9. The net worth of a foreign corporation taxable under clause (1) of subsection (a) of section thirty-nine shall be such portion of the book value of its total assets less its liabilities on the last day of the taxable year as the book value of its tangible assets situated within the commonwealth on said date and not subject to local taxation plus the amount of its intangible assets on said date allocable to this commonwealth, as hereinafter determined, bear to the book value of its total assets on said date. The intangible assets allocable to this commonwealth shall be such portion of the book value of its total intangible assets on the last day of the taxable year,

less the book value on said date of its investment in and advances to subsidiary corporations not doing business in the commonwealth which represent eighty per cent or more of the voting stock of said corporations, as shall be found by multiplying said amount by such corporation's income apportionment percentage, as determined under the provisions of section thirty-eight. In determining the book value of any asset, the commissioner may disallow any reserve, in whole or in part, with respect thereto which, in his judgment, is not reasonable and proper. For the purpose of this paragraph, "advances" shall mean such interests in a corporation where a corporation-shareholder relationship exists, determined under such regulations as the commissioner may issue and under the provisions of section three hundred and eighty-five of the Federal Internal Revenue Code as amended and in effect for the taxable year and the regulations issued thereunder.

10. "Tangible property corporation", a corporation whose tangible property situated in the commonwealth on the last day of the taxable year and not subject to local taxation is ten per cent or more of such portion of its total assets on the last day of the taxable year less those assets as are situated in the commonwealth on the last day of the taxable year and are subject to local taxation, and, for a foreign corporation, less its investment on said date in foreign corporations not registered to do business nor doing business in the commonwealth, as shall be found by multiplying said amount by such corporation's income apportionment percentage, as determined under the provisions of section thirty-eight, or a corporation which, in the judgment of

the commissioner, should be so classified For the purpose of this paragraph, the assets of the corporation shall be valued at their book value.

11. "Intangible property corporation", a corporation whose tangible property situated in the commonwealth on the last day of the taxable year and not subject to local taxation is less than ten per cent of such portion of its total assets on the last day of the taxable year less those assets as are situated in the commonwealth on the last day of the taxable year and are subject to local taxation, and, for a foreign corporation, less its investment on said date in foreign corporations not registered to do business nor doing business in the commonwealth, as shall be found by multiplying said amount by such corporation's income apportionment percentage, as determined under the provisions of section thirty-eight, or a corporation which, in the judgment of the commissioner, should be so classified. For the purpose of this paragraph, the assets of the corporation shall be valued at their book value.

* * *

Mass. Gen. Laws ch. 63, § 32. Domestic corporations; rate.

Section 32. Except as otherwise provided herein, every domestic corporation, exercising its charter, or qualified to do business or actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay, on account of each taxable year, the

excise provided in subsection (a) or (b) of this section, whichever is greater.

The excise levied herein is due and payable on any one or all of the following alternative incidents:

(1) The qualification to carry on or do business in this state or the actual doing of business within the commonwealth in a corporate form. The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in the commonwealth, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

(2) The exercising of a corporation's charter or the continuance of its charter within the commonwealth.

(3) The owning or using any part or all of its capital, plant or other property in the commonwealth in a corporate capacity.

It is the purpose of this section to require the payment of this excise to the commonwealth by domestic corporations for the right granted by the laws of the commonwealth to exist as such an organization and for the enjoyment under the protection of the laws of the commonwealth, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation.

In the case of a corporation whose taxable year is a period of less than twelve calendar months, the portion of the amount determined

under clause (1) of subsection (a) shall be multiplied by a fraction whose numerator is the number of months included in the taxable year and whose denominator is twelve.

(a) An amount equal to the sum of: –

(1) Seven dollars per thousand upon the value of: –

(i) its tangible property as determined to be taxable under paragraph 7 of section thirty if a tangible property corporation; or

(ii) its net worth as determined to be taxable under paragraph 8 of section thirty if an intangible property corporation; and

(2) Eight and thirty-three one hundredths per cent of its net income determined to be taxable in accordance with the provisions of this chapter.

(b) Four hundred dollars.

Mass. Gen. Laws ch. 63, § 39. Foreign corporations; tax rate.

Section 39. Except as otherwise provided herein, every foreign corporation, exercising its charter, or qualified to do business or actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay, on account of each taxable year, the excise provided in subsection (a) or (b) of this section, whichever is greater.

The excise levied herein is due and payable on any one or all of the following alternative incidents:

(1) The qualification to carry on or do business in this state or the actual doing of business within the commonwealth in a corporate form. The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in the commonwealth, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

(2) The exercising of a corporation's charter or the continuance of its charter within the commonwealth.

(3) The owning or using any part or all of its capital, plant or other property in the commonwealth in a corporate capacity.

It is the purpose of this section to require the payment of this excise to the commonwealth by foreign corporations for the enjoyment under the protection of the laws of the commonwealth, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation.

In the case of a corporation whose taxable year is a period of less than twelve calendar months, the portion of the amount determined under clause (1) of subsection (a) shall be multiplied by a fraction whose numerator is the number of months included in the taxable year and whose denominator is twelve.

(a) An amount equal to the sum of: –

(1) Seven dollars per thousand upon the value of –

(i) its tangible property as determined to be taxable under paragraph 7 of section thirty if a tangible property corporation, or

(ii) its net worth as determined to be taxable under paragraph 9 of section thirty if an intangible property corporation; and

(2) Eight and thirty-three one hundredths per cent of its net income determined to be taxable in accordance with the provisions of this chapter.

(b) Four hundred dollars.

A foreign corporation shall not be subject to tax under this chapter if the foreign corporation is engaged in the business of selling tangible personal property and taxation of that foreign corporation under this chapter is precluded by the Constitution or laws of the United States, or would be so precluded except for the fact that the foreign corporation stored tangible personal property in a licensed public storage warehouse, provided, that no portion of any warehouse which is owned or leased by a consignor or consignee of the tangible personal property shall be deemed a licensed public warehouse.

Mass. Gen. Laws ch. 63, § 52. Unconstitutionality of excise tax law; effect; revival of former act.

Section 52. If the provisions of section thirty-two imposing an excise on domestic business corporations

and, by reference in section thirty-eight C, on domestic manufacturing corporations as therein defined are declared unconstitutional or inoperative by a final judgment, order or decree of the supreme court of the United States or of the supreme judicial court of the commonwealth, such portion of the law relating to business corporations, and domestic manufacturing corporations as so defined, as set forth in sections thirty to forty-two B, inclusive, as relates solely to domestic business corporations, and domestic manufacturing corporations as so defined, shall be null and void, and such portion of said law as relates in part to domestic business corporations, and domestic manufacturing corporations as so defined, shall become inapplicable to such corporations. In such event, all laws applicable to domestic business corporations, including domestic manufacturing corporations as so defined, which were repealed or were made inoperative as to, or inapplicable to, such corporations by chapter three hundred and fifty-five of the General Acts of nineteen hundred and nineteen shall thereupon be revived and become operative and applicable in respect to such corporations and shall be continued in full force and effect from the first day of January antedating by five years the first day of January of the calendar year in which such final judgment, order or decree is entered, to the same extent as if said chapter three hundred and fifty-five had not been enacted. If the provisions of section thirty-nine imposing an excise on foreign corporations and, by reference in section forty-two B, on foreign manufacturing corporations as therein defined are declared unconstitutional or inoperative by any such final judgment, order or decree, such portion of the law relating to

business corporations, and foreign manufacturing corporations as so defined, as set forth in sections thirty to forty-two B, inclusive, as relates solely to foreign corporations and foreign manufacturing corporations as so defined shall be null and void, and such portion of said law as relates in part to foreign corporations and foreign manufacturing corporations as so defined shall become inapplicable to such corporations. In such event, all laws applicable to foreign corporations, including foreign manufacturing corporations as so defined, which were repealed, or were made inoperative as to, or inapplicable to, such corporations or to the property thereof by said chapter three hundred and fifty-five shall thereupon be revived and become operative and applicable in respect to such corporations and the property thereof and shall be continued in full force and effect from the first day of January antedating by five years the first day of January of the calendar year in which such final judgment, order or decree is entered, to the same extent as if said chapter three hundred and fifty-five had not been enacted. The commissioner and the local assessors shall as soon as may be assess all taxes for which liability has been incurred under the laws revived, made operative or applicable or continued in force by the foregoing provisions or any of them. The time for assessing such taxes shall be extended for a period of one year from the date of entry of such final judgment, order or decree and, for performing any duty subsequent to assessment, the time shall be extended for a further period after such assessment commensurate with the period which would have obtained under the laws hereby revived and again made operative, applicable and continued in force. Privileges and rights

granted shall be correspondingly extended. Excises declared invalid by reason of the foregoing premises, which were assessed on or after the date when the laws repealed or made inoperative or inapplicable by said chapter three hundred and fifty-five are revived, made operative or applicable or continued in force as herein provided, shall, to the extent that such excises have been paid and are unrefunded, be credited against the taxes assessed for the same period under the laws revived and again made operative, applicable and continued in force; provided, that if such credit exceeds the taxes due, the excess shall be refunded upon warrant of the commissioner to the state treasurer. There shall be no further or other recovery of the amounts thus credited or refunded. If any part, section or subdivision of said sections thirty to forty-two B, inclusive, other than the provisions in section thirty-two, thirty-eight C, thirty-nine or forty-two B imposing an excise, shall be declared unconstitutional or inoperative, the remaining parts of said sections thirty to forty-two B, inclusive, shall not be affected thereby.

APPENDIX D

[LOGO] Corporate Excise
DOR Directive 99-1

Massachusetts
Department of
Revenue

Determining whether a corporation is a tangible property corporation or an intangible property corporation under G.L. c. 63 §§ 30.10, 30.11; calculating net worth of intangible property corporations under G.L. c. 63 § 30.8 and 30.9.

Introduction:

In two instances the corporate excise statute requires foreign corporations and domestic corporations to employ different formulas in determining their tax liability. Specifically, those are: (i) the determination of a corporation's status as a tangible or intangible property corporation, and (ii) the calculation of net worth for intangible property corporations. Some elements of these formulas were invalidated on federal constitutional grounds. *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763 (1995), *cert. denied*, 516 U.S. 822 (1995). In accordance with the decision in *Perini*, this Directive clarifies the method for determining whether a corporation is a tangible or intangible property corporation, and for calculating an intangible property corporation's net worth.

Issues:

1. How should domestic and foreign corporations determine whether they are tangible or intangible property corporations under G.L. c. 63 §§ 30.10, 30.11?

2. How should domestic and foreign intangible property corporations calculate their corporate net worth under G.L. c. 63 §§ 30.8 and 30.9?

Directive #1:

Domestic and foreign corporations are permitted to choose either of the two "Tangible or Intangible Property Corporation Classification" formulas from Schedule B of Forms 355A and 355B, for current and future taxable years, starting with the first tax year beginning after the date of this Directive. Thus, in making the determination of whether the corporation is a tangible or intangible property corporation, a domestic corporation can choose either (i) the formula for domestic corporations or (ii) the formula for foreign corporations, as the formulas are set out in G.L. c. 63 §§ 30.10, 30.11. Likewise, a foreign corporation can choose either (i) the formula for domestic corporations or (ii) the formula for foreign corporations, as set out in G.L. c. 63 §§ 30.10, 30.11. Corporations are permitted to make this choice annually.

Directive #2:

Regardless of the formula they choose to determine their status as an intangible property corporation, domestic and foreign intangible property corporations are permitted to choose either of the two net worth formulas, from

Schedule D of Forms 355A and 355B, for calculating tax liability for current and future taxable years, starting with the first tax year beginning after the date of this Directive. A domestic corporation can choose either (i) the formula for domestic corporations set out in G.L. c. 63 § 30.8 or (ii) the formula for foreign corporations set out in G.L. c. 63 § 30.9. A foreign corporation can choose either (i) the formula for domestic corporations set out in G.L. c. 63 § 30.8 or (ii) the formula for foreign corporations set out in G.L. c. 63 § 30.9. In applying these formulas, a corporation may deduct from its net worth the value of any subsidiary as to which the 80% voting stock interest requirement of the statute is satisfied, regardless of where the subsidiary is organized or is doing business. Corporations are permitted to make this choice annually.

Directive #3:

Corporations that would have benefited from the choice of formulas in this directive in prior tax years may be entitled to an abatement. Subject to the statute of limitations imposed by G.L. c. 62C § 37, corporations may apply for an abatement of taxes by using Form CA-6, according to instructions found at 830 CMR 62C.37.1 and TIR 93-11.

Discussion of Law:

The corporate excise statute provides separate methods for determining the status of domestic and foreign corporations as tangible or intangible property corporations. G.L. c. 63 §§ 30.7, 30.8. Under the statute, tangible and

intangible property corporations are taxed differently under the non-income measure of the corporate excise. *See* G.L. c. 63 §§ 32 (a)(1)(i), (ii), 39 (a)(1)(i), (ii). The formulas for determining tangible/intangible status are set forth in the forms and instructions for Schedule B of form 355A (Domestic Business or Manufacturing Corporation Excise Return) and Form 355B (Foreign Business or Manufacturing Corporation Excise Return).

Intangible property corporations are subject to a .26% tax on their net worth. G.L. c. 63 § 32 (a)(ii), G.L. c. 63 § 39 (a)(ii). The corporate excise statute provides separate formulas for calculating the net worth of domestic and foreign corporations. G.L. c. 63 § 30 (8), (9). Those formulas are set forth in the forms and instructions for Schedule D of Form 355A and Form 355B.

The Supreme Judicial Court, in *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763 (1995), *cert. denied*, 516 U.S. 822 (1995), struck down as unconstitutional some parts of the corporate net worth formulas of G.L. c. 63 §§ 30.8 and 30.9. Specifically, the court invalidated the portion of G.L. c. 63 § 30.8 that prevented a domestic corporation from deducting from its net worth the value of a subsidiary not incorporated in Massachusetts if the domestic corporation owned 80% or more of the voting stock of the subsidiary. The court also invalidated the portion of G.L. c. 63 § 30.9 that prevented a foreign corporation from deducting from its net worth the value of a subsidiary incorporated or doing business in Massachusetts if the foreign corporation owned 80% or more of the voting stock of the subsidiary. The forms and instructions for the corporate excise return forms were revised to conform to the holding in *Perini*.

This Directive further clarifies the corporate excise statute in light of pending constitutional challenges to the divergent statutory treatment of domestic and foreign corporations. Without acknowledging the legal merit of these challenges, the Commissioner will permit corporations to determine whether they are tangible or intangible property corporations using the statutory method for either domestic or foreign corporations, regardless of whether the corporation is domestic or foreign. Similarly, the Commissioner will permit such corporations to calculate their corporate excise using the statutory net worth formula for either domestic or foreign corporations.

Effective for its first taxable year beginning on or after January 1, 1999, a corporation may elect to use either the statutory formula for domestic or foreign corporations to determine whether the corporation is a tangible or intangible property corporation. The election is made by using Schedule B from either Form 355A or Form 355B on the return for that year. Likewise, effective for its first taxable year beginning on or after the date of this Directive, an intangible property corporation may elect to use either the statutory formula for domestic or foreign corporations for calculating its net worth. The election is made by using Schedule D from either Form 355A or 355B on the return for that year.

Corporations that would have benefited in prior years from the choice of methods for determining their status as tangible or intangible property corporations, or from the choice of net worth formulas, may be entitled to an abatement. These abatements are subject to the statute of limitations set forth at G.L. c. 62C § 37. Corporations may

apply for an abatement of taxes using form CA-6, according to instructions found at 830 CMR 62C.37.1 and TIR 93-11.

/s/ Bernard F. Crowley, Jr.
Bernard F. Crowley, Jr.
Acting Commissioner
of Revenue
January 4, 1999

APPENDIX E

[SEAL] **Technical Information Release**
Commonwealth of Massachusetts
Department of Revenue

TIR 99-3
Effective Date Clarification for Department Directive 99-1 (The *Perini* Directive)

The purpose of this Technical Information Release (TIR) is to clarify the effective date of Directive 99-1 and to provide the proper procedure for applying the Supreme Judicial Court's decision in *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763 (1995), *cert. denied*, 516 U.S. 822 (1995) to returns with tax years beginning on or before December 31, 1998.

The elections available under Directive 99-1 are available both prospectively and, to the extent the applicable statute of limitations has not expired, retroactively. However, the processes for making the election in future and past years differ. Under Directive 99-1, a corporation, effective for its first taxable year beginning on or after January 1, 1999, may elect on its return to use either the statutory formula for domestic or foreign corporations to determine whether the corporation is a tangible or intangible property corporation. In addition, an intangible property corporation, also effective for its first taxable year beginning on or after January 1, 1999, may elect on its return to use either the statutory formula for domestic or foreign corporations in calculating its net worth. To the extent that any portion of Directive 99-1 is inconsistent with these effective dates, that portion is modified and superseded by this TIR.

Taxpayers filing calendar or fiscal year returns with tax years beginning on or before December 31, 1998 cannot file a 1998 return that follows Directive 99-1 since the 1998 forms, as well as those for prior years, do not incorporate the changes required by the Directive and the *Perini* decision. The proper procedure for calendar and fiscal year taxpayers that wish to apply the principles of Directive 99-1 to tax years beginning prior to January 1, 1999 is to file an abatement application after filing their return. In other words, with respect to the filing of a 1998 corporate excise return and prior year returns, a taxpayer must file the return in accordance with the instructions on the applicable forms, *see* Schedules B and D of Forms 355A and 355B, and then file an abatement form, Form CA-6, prior to the expiration of the period for filing an abatement, *see* G.L. c. 62C, s. 26 and TIR 93-11. The 1999 forms will be drafted so as to allow the elections made pursuant to Directive 99-1 to be made on the return itself.

/s/ Bernard F. Crowley, Jr.
Bernard F. Crowley, Jr.
Acting Commissioner
of Revenue

February 11, 1999

APPENDIX F

EXPERT OPINION OF PROFESSOR RICHARD D. POMP[1] TEXTRON INC. AND SUBSIDIARIES V. COMMISSIONER OF REVENUE

Introduction

You have asked my opinion as the former Director of the New York Tax Study Commission and as someone who for nearly 25 years has studied, lectured, taught, published, and consulted with, and testified on behalf of, state governments on the subject of state taxation. Specifically, you have asked my opinion on two features of Massachusetts law as applied to Textron Inc. and its subsidiaries: the throwback rule and the property component of the corporation excise tax.

* * *

III. Discriminatory Treatment of Foreign Corporations under the Property Component of the Corporation Excise Tax

A. Background

1. General Overview and the Sources of Discrimination Inherent in the Statute

The Massachusetts corporation excise tax is partially based on a property measure and partially on an income measure. Corporations doing business in the state are subject to both taxes. The income measure is net income

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[1] Visiting Professor, Harvard Law School; Alva P. Loiselle Professor of Law, University of Connecticut Law School; Adjunct Professor of Law, NYU Law School (LL.M Program in Taxation); Adjunct Professor of Law, Columbia Law School.

apportioned to Massachusetts and has been described in Section II, A, above. This section of the report focuses on the property measure and the discrimination that exists between domestic corporations (those incorporated in Massachusetts) and foreign corporations (those incorporated outside Massachusetts).

The property measure of the excise tax defies easy summarization. It is convoluted, and to the best of my knowledge, not duplicated by any other state. Perhaps one reason that no other state has adopted an identical approach is the discrimination that exists between domestic and foreign corporations.

The first step in calculating the property measure is to classify a corporation as either a tangible property corporation or as an intangible property corporation. This initial classification is critical to determining the tax that will ultimately be paid. Corporations classified as tangible property corporations are taxed on their Massachusetts property that is not subject to local taxation, whereas corporations classified as intangible property corporations are taxed on their net worth.

In making this critical classification, the state discriminates between domestic and foreign corporations. The test for whether a corporation is a tangible or an intangible property corporation is different for domestic corporations than for foreign corporations.

Moreover, in taxing intangible property corporations on their net worth the state again discriminates between domestic and foreign corporations. Domestic corporations calculate their net worth tax in a manner different from foreign corporations. Accordingly, two sources of

discrimination exist. First, the definition of a tangible or intangible property corporation is different for domestic corporations than for foreign corporations. Second, a corporation that is classified as an intangible property corporation is subject to a different tax calculation depending on whether it is a domestic or foreign corporation.

2. Detailed Overview

a. Definition of Tangible and Intangible Property Corporation and the Inherent Statutory Discrimination

As the above discussion makes clear, whether a corporation is considered to be a tangible property or an intangible property corporation determines how it will be taxed. A domestic corporation is a tangible property corporation if its Massachusetts tangible property that is not taxed locally is 10% or greater of its total assets less its Massachusetts assets subject to local taxation, multiplied by its income apportionment factor. Ch. 63, § 30(10). A different rule, however, applies to foreign corporations. A foreign corporation is classified as a tangible property corporation if its Massachusetts tangible property that is not taxed locally is 10% or greater of its total assets less its Massachusetts assets subject to local taxation, *less its investment in foreign corporations not doing business in Massachusetts,* multiplied by its apportionment percentage. Ch. 63, § 30(10). The italicized language in the preceding sentence highlights one source of discrimination between domestic and foreign corporations.[9]

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[9] The italicized language was not before the Court in Perini, see note 10 infra, and accompanying text. The reasoning in Perini, however, would suggest that the italicized language is

A corporation that is not a tangible property corporation is an intangible property corporation. Accordingly, the discrimination between domestic and foreign corporations in the definition of a tangible property corporation automatically carries over to the definition of an intangible property corporation. Ch. 63, § 30(11).

b. The Taxation of Tangible Property Corporations and the Inherent Statutory Discrimination

Tangible property corporations are taxed at a rate of .0026 times their Massachusetts tangible property not taxed locally. Ch. 63, § 30(7). This calculation applies to all tangible property corporations, whether domestic or foreign. Although the calculation of the tax is neutral on its face, as explained above the definition of a tangible property corporation is different for domestic corporations than for foreign corporations. A domestic corporation is considered a tangible property corporation if its Massachusetts tangible property not taxed locally is 10% or greater of its total assets less its Massachusetts assets taxed locally, times its apportionment factor. A foreign corporation is considered a tangible property corporation if its Massachusetts tangible property not taxed locally is 10% or greater of its total assets less its Massachusetts assets taxed locally, less investment in foreign corporations not doing business in Massachusetts, multiplied by its apportionment percentage.

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unconstitutional because it discriminates against interstate commerce.

c. The Taxation of Intangible Property Corporations and the Inherent Statutory Discrimination

Not only does the statute discriminate in the definition of tangible and intangible property corporations, but also it further discriminates because of the different way in which intangible corporations are taxed, depending on whether they are domestic or foreign.

The taxable net worth of a domestic intangible corporation is its total assets less liabilities, less Massachusetts tangible property subject to local taxation, less the interest of any mortgagee in such property, less any investment in 80% or more owned Massachusetts corporations,[10] with the resulting amount multiplied by the income apportionment percentage. Ch. 63, § 30(8).

In sharp contrast, the taxable net worth of a foreign intangible corporation is its total assets less liabilities multiplied by its so-called net worth factor. The net worth factor is calculated by first subtracting from a foreign corporation's intangible assets its investment in 80% or more owned foreign corporations not doing business in

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[10] As discussed infra in the text, Perini I held that this part of the statute unconstitutionally discriminated against interstate commerce. Because of that decision, a domestic corporation can now deduct its investment in both 80% or more owned domestic and foreign corporations, whether doing business in Massachusetts or not. That case, however, does not affect the point in the text, which is that foreign corporations are still taxed differently from domestic corporations, even after Perini.

Massachusetts.[11] That amount is multiplied by the corporation's apportionment percentage. The result is added to its Massachusetts tangible property not subject to local taxation and divided by the corporation's total assets. That final amount is the net worth factor. Ch. 63, § 30(9).

Putting aside all of the details, the bottom line is that this rather convoluted method of determining the taxable net worth of a foreign intangible property corporation is different from the way domestic intangible property corporations calculate their taxable net worth. Consequently, it is clear that the statute again discriminates between domestic and foreign corporations.

The following chart summarizes the discrimination inherent in the Massachusetts statute.

Discrimination Inherent in the Statute

Definition of Tangible Property Corporation	Discriminates Between Domestic and Foreign Corporations
Definition of Intangible Property Corporation	Discriminates Between Domestic and Foreign Corporations
Net Worth Calculation	Discriminates Between Domestic and Foreign Corporations[12]

[11] Id.

[12] One aspect of this discrimination was dealt with in Perini I and II.

1. Perini I.

The Massachusetts courts have recognized that the property measure of the excise tax discriminates between domestic and foreign corporations. One source of the discrimination was struck down by the Massachusetts Supreme Court in Perini Corp. v. Commissioner of Revenue, 419 Mass. 763, cert. denied sub nom., Adams v. Perini Corp., 116 S. Ct. 83 (1995) (Perini I). In that case, the taxpayers, which included both domestic and foreign intangible property corporations, were challenging the treatment of investments in 80% or more owned corporations. As the above discussion highlighted, this treatment varied, depending on whether the taxpayer was a domestic or a foreign corporation.

More specifically, domestic intangible property corporations could deduct from their taxable net worth the value of an 80% or more owned subsidiary, but only if that subsidiary were incorporated in Massachusetts. By comparison, in calculating its net worth factor, a foreign intangible property corporation could deduct the value of an 80% or more owned subsidiary only if that subsidiary were incorporated outside of Massachusetts and did no business in Massachusetts. Perini I held that this aspect of the Massachusetts statute facially discriminated against interstate commerce and violated the commerce clause of the U.S. Constitution.

2. Perini II.

The Perini I court remanded the case for a decision on the issue of remedies. In the remanded case, the taxpayers

argued that all intangible property corporations, domestic or foreign, should receive a deduction for their investment in an 80% or more subsidiary, regardless of whether that subsidiary was domestic or foreign, and regardless of whether that subsidiary did business in Massachusetts or not. The state argued that neither domestic nor foreign corporations should receive a deduction for their investment in any subsidiaries.

In Perini Corp., et al. v. Adams, No. SJC-06657, 5/13/96 (Perini II), the court adopted the remedy requested by the taxpayers on the grounds that it was more consistent with the intent of the statute, which was to eliminate double taxation. The court also viewed the state's position, which would increase taxes on some corporations, as more properly a legislative judgment, beyond the function of a court.

The present case raises issues similar to those already resolved in Perini I. It is undisputed that Textron is a foreign corporation and is taxed on its net worth tax differently from a domestic corporation. If it were a domestic corporation, it would have paid less tax during the years at issue. The Massachusetts statute, as Perini I recognized, is facially discriminatory and treats Textron unfairly.

The treatment of 80% or more owned subsidiaries, however, which was challenged in Perini I, is only one of the facially discriminatory provisions that mark the statutory scheme. The formula for determining the net worth of a domestic corporation is fundamentally different from that used for calculating the net worth of a foreign corporation, even after the remedy imposed by Perini II is taken

into account. Indeed, notwithstanding Perini II, two sources of discrimination remain in the Massachusetts statute.

First, the definition of a tangible property corporation is still different for domestic corporations than for foreign corporations. The taxpayers in Perini I did not address this issue.

Second, the method of taxing the net worth of an intangible property corporation continues to be different for domestic corporations than for foreign corporations. The taxpayers in Perini also did not address this aspect of the statute. Indeed, Perini I and II dealt with just one narrow aspect of the facial discrimination inherent in the Massachusetts statute because that is all the taxpayers challenged in those cases. Perini II did not eliminate all sources of discrimination in the statute because the court was not asked to do so in that case. Nonetheless, the reasoning in Perini I and II applies equally to the other discriminatory features of the statute.

B. The Board Must Decide if the § 52 Remedy Set Forth in the Statute Should Apply

The discriminatory features of the property component of the excise tax were adopted in 1919. The 1919 Massachusetts Legislature apparently realized that it was on constitutionally-shaky ground. Anticipating the day when a Perini-like decision would hold the tax unconstitutional, the Legislature specifically provided inter alia that "[i]f the . . . excise on foreign corporations . . . [is] declared unconstitutional or inoperative by any such final judgment, order, or decree, such portion of the law . . . shall be null and void, and such portion of said law as

relates in part to foreign corporations . . . shall become inapplicable . . . In such event, all laws applicable to foreign corporations . . . which were repealed, or were made inoperative as to, or inapplicable to, such corporations or to the property thereof . . . shall become revived and become operative . . . Ch. 63 § 52.

The law that was repealed when the excise tax was adopted provided that a foreign corporation would pay a tax equal to one-fiftieth of one percent of the par value of its authorized capital stock as stated in its annual certificate of condition, with a $2,000 cap. Acts, 1909, Ch. 490, Part III, Sec. 56.[13]

If Textron and its consolidated subsidiaries were to calculate their tax as foreign corporations under the § 52 remedy, it would be eligible for a refund in 1990, 1991, and 1992 of $253,961, $310,540, and $341,529, respectively.[14] See Appendix A.

The taxpayers in Perini did not draw the court's attention to the explicit remedy in § 52 so that this issue went unaddressed in Perini I or II. Because the statute sets forth an explicit remedy, the Board must decide if there are any reasons why it should deviate from this clearly expressed legislative remedy and design its own remedy.

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[13] The constitutionality of the 1909 tax was upheld in Baltic Mining Co. v. Massachusetts, 231 U.S. 68 (1913). The $2,000 cap was later eliminated as part of changes made in 1914, but that version of the law was held to be unconstitutional in International Paper Co. v. Mass., 246 U.S. 135 (1917).

[14] These amounts are calculated under the 1909 version of the tax for foreign corporations. See supra note 13 and accompanying text.

C. The Effect of Directive 99-1

On January 4, 1999, the Department released Revenue Directive 99-1. (TIR 99-3 clarified the effective date of the Directive). The Directive recognizes that the property component of the net worth tax is unconstitutionally discriminatory. The Directive permits domestic and foreign corporations to elect to be classified as either a tangible property corporation or an intangible property corporation. In addition, corporations can elect to use either the net worth formula for domestic corporations or the net worth formula for foreign corporations. In applying these formulas, a corporation may deduct from its net worth the value of any subsidiary for which the 80% voting stock interest requirement of the statute is satisfied, regardless of where the subsidiary is organized or is doing business.

Corporations are permitted annually to make the election set forth in the Directive. The election is available for all years that are still open under the statute of limitation. The Directive is silent regarding the statutory remedy set forth in Ch. 63, § 52, described above.

In my opinion, the Directive violates a fundamental principle of the separation of powers. This principle is of general applicability, and has ramifications that go well beyond tax policy. Under the separation of powers policy, an executive agency, such as the tax department, cannot overrule the actions of a legislative body. The lawmaking powers reside in the popularly elected Massachusetts Legislature. That Legislature passed the remedy set forth in Ch. 63, § 52. That relief mechanism remains the law of the Commonwealth whether the Department endorses

the statute or not. If the Department is unhappy with the statutory relief, it may lobby for a legislative change. Through a directive, policy statement, or regulation, the Department can interpret, apply, or explain the statute. But what the Department cannot do, without usurping the powers of the Massachusetts Legislature and undercutting the will of the people as expressed through their elected officials, is to overrule the statute through the unilateral administrative action of issuing a directive.

F. Summary of Refunds Under § 52 Compared with Directive 99-1

The following chart summarizes the net refund before credits for 1990, 1991, and 1992 under § 52 and under Directive 99-1.

Year	Section 52 Remedy	Directive 99-1
1990	$253,961	$ 5,177
1991	$310,540	$25,988
1992	$341,529	$ 5,190

Conclusion

Textron raises two issues in this case.

* * *

The second of the two issues raised by Textron picks up where Perini I and II left off. Those cases recognized that the property measure of the excise tax is unconstitutional because of the discrimination between domestic and foreign corporations. The taxpayers in Perini, however, did not ask the court to apply the § 52 remedy that the Legislature had already provided in case the statute were

found to be unconstitutional. Rather, they focused on only one aspect that was of concern to them: the treatment of 80% or more owned subsidiaries.

Textron, however, is requesting more general relief. Long before Textron raised this issue, the Legislature had already provided a § 52 remedy if the tax on foreign corporations were found to be unconstitutional. That remedy calls for reviving the previous tax, which was based on the par value of authorized stock. The Legislature's vision and will in providing that remedy should be implemented.

APPENDIX A

SECTION 52 SUMMARY
TEXTRON INC. AND SUBSIDIARIES
SUMMARY OF TAX OVERPAID PURSUANT TO MA SECTION 52 REMEDY
FOR CALENDAR YEARS 1990 THROUGH 1992

1990 COMPANY	AUTHORIZED SHARES	PAR VALUE PER SHARE	CAPITALIZATION TOTAL	TAX OF 1/50 OF 1%	MAXIMUM	TAX DUE [U]NDER MA ACTS OF 1909 CH. 490, PART III	* EXCISE PER AUDIT	TAX (OVERPAID) UNDERPAID
TEXTRON INC.	250,000,000	0.125	31,250,000	6,250	2,000	$2,000	$5,633	($3,633)
TEXTRON FINANCIAL CORPORATION	4,000	100.00	400,000	80		80	5,256	(5,176)
AVCO CORPORATION	100	0.10	10	0		0	170,979	(170,979)
AVCO RESEARCH LABORATORIES	1,000	1.00	1,000	0		0	27,814	(27,814)
BABCO	5,000,000	0.03	125,000	25		25	33,553	(33,528)
MCCORD WINN TEXTRON INC.	50,000	20.00	1,000,000	200		200	13,031	(12,831)
SUBTOTAL TAX (OVERPAID)								**($253,961)**
1991								
TEXTRON INC.	250,000,000	0.125	31,250,000	6,250	2,000	2,000	26,444	($24,444)
TEXTRON FINANCIAL CORPORATION	4,000	100.00	400,000	80		80	7,836	(7,756)
AVCO CORPORATION	100	0.10	10	0		0	231,952	(231,952)
BABCO	5,000,000	0.03	125,000	25		25	32,954	(32,929)
MCCORD WINN TEXTRON INC.	50,000	20.00	1,000,000	200		200	13,659	(13,459)
SUBTOTAL TAX (OVERPAID)								**($310,540)**
1992								
TEXTRON INC.	250,000,000	0.125	31,250,000	6,250	2,000	2,000	5,646	($3,646)
TEXTRON FINANCIAL CORPORATION	4,000	100.00	400,000	80		80	29,261	(29,181)
AVCO CORPORATION	100	0.10	10	0		0	271,553	(271,553)
BABCO	5,000,000	0.03	125,000	25		25	26,206	(26,181)
MCCORD WINN TEXTRON INC.	50,000	20.00	1,000,000	200		200	11,168	(10,968)
SUBTOTAL TAX (OVERPAID)								**($341,529)**
GRAND TOTAL TAX (OVERPAID)						$6,915	$912,945	**($906,030)**

* Note: Excise per audit before credits.

(2)
Supreme Court, U.S.
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No. 01-1083

In The

Supreme Court of the United States

TEXTRON INC., *et al.*,

Petitioners,

v.

COMMISSIONER OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

BRIEF OF GENERAL MOTORS CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court, General Motors Corporation, a Delaware corporation, respectfully submits this brief as *amicus curiae* in support of Petitioner.[1] General Motors is a multi-state and multi-national corporation headquartered in Detroit, Michigan. General Motors, by itself and through a variety of subsidiaries, does business in all 50 states and employs over 212,000 people in North America. General Motors is engaged in the production and sale of motor vehicles and locomotives and in satellite broadcasting activities. In addition, General Motors, through its General Motors Acceptance Corporation subsidiary and its subsidiaries, engages in the financing of motor vehicles and residential and commercial properties.

General Motors, as a corporation incorporated and domiciled outside the state of Massachusetts, has a vital interest in the resolution of this case which concerns the constitutionality of certain aspects of the Massachusetts corporate excise tax. In the opinion below, *Textron Inc., et al. v. Commissioner of Revenue*, 435 Mass. 297, 756 N.E.2d 1142 (2001), the Massachusetts Supreme Judicial Court, inter alia, endorsed Directive 99-1 which was issued by the Massachusetts Department of Revenue in an attempt

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[1] Pursuant to Rule 37.6, amicus General Motors Corporation states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. General Motors Corporation has received the written consents of Petitioners and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

to correct certain constitutional defects in the Massachusetts corporate excise tax as identified by the Massachusetts Supreme Judicial Court in *Perini Corp., et al. v. Commissioner of Revenue*, 419 Mass. 763, 647 N.E.2d 52, *cert. denied*, 516 U.S. 822 (1995). General Motors asserts that the Massachusetts Supreme Judicial Court's endorsement of Directive 99-1 in the opinion below was erroneous in that the Directive fails to correct all constitutional defects in the corporate excise tax. General Motors submits that Massachusetts' attempt to correct the corporate excise tax's infirmities through the adoption of Directive 99-1 will have a significant, adverse effect on interstate commerce which will only be exacerbated if other states follow Massachusetts' lead and adopt similar taxing provisions. General Motors believes that all taxpayers and all states will be best served by tax rules that do not treat domestic corporations more favorably than their foreign counterparts. Because of its years of practical experience, General Motors believes that it is uniquely suited to assist this Court in resolving the questions presented in the Petitioners' petition for a writ of certiorari.

INTRODUCTORY STATEMENT

This brief is submitted by General Motors Corporation as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consents of the petitioner and respondent have been obtained and filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Prior to the Massachusetts Supreme Judicial Court's decision in *Perini*, domestic intangible property corporations, in determining their net worth for purposes of the Massachusetts corporate excise tax, were entitled to deduct: 1) investments in Massachusetts subsidiaries in which they owned 80% or more of the stock; and 2) tangible property located in Massachusetts subject to local taxation. As a result of the *Perini* decision, both foreign and domestic intangible property corporations are permitted to deduct their investments in 80% owned subsidiaries regardless of state of incorporation or domicile of the subsidiary. The Massachusetts Department of Revenue stated this rule in Directive 99-1 (issued January 4, 1999). However, neither the *Perini* decision nor Directive 99-1 addressed the constitutional ramifications of limiting the deduction from net worth to tangible property located in Massachusetts only. The Massachusetts Supreme Judicial Court, in the decision below, endorsed Directive 99-1 without considering the question of whether the Massachusetts corporate excise tax continues to discriminate in favor of domestic corporations by limiting the deduction from net worth to property located in Massachusetts only.

The Commerce Clause of the U.S. Constitution prohibits states from discriminating against interstate commerce by providing a direct commercial advantage to local business. By permitting a deduction from net worth for tangible property located in Massachusetts, but not for tangible property located outside the state, Massachusetts provides a direct commercial advantage to those businesses that invest in Massachusetts property and

thereby unconstitutionally discriminates against interstate commerce in violation of the Commerce Clause. Directive 99-1, which purportedly attempts to alleviate the constitutional infirmities in the corporate excise tax as identified by the *Perini* decision, fails to address this remaining infirmity. Accordingly, the Massachusetts Supreme Judicial Court's endorsement of Directive 99-1 in the opinion below is erroneous.

Additionally, the Directive fails to provide the clear and certain remedy required by the Due Process Clause. This absence of a clear and certain remedy is underscored by the fact that the Massachusetts Department of Revenue has failed, in practice, to apply the Directive as written.

This Court should grant the petition for a writ of certiorari, reverse the decision below, and prohibit Massachusetts from continuing to enforce a tax statute that remains unconstitutionally discriminatory.

ARGUMENT

I.

The Massachusetts corporate excise tax is a privilege tax imposed for the privilege of carrying on business in a corporate capacity. Mass. Gen. Laws ch. 63, §§32, 39. The tax is measured by both net income and property (either tangible property or net worth). *Id.* The questions presented in this case concern only the property measure of the Massachusetts corporate excise tax.

With respect to the property component of the Massachusetts corporate excise tax, Massachusetts law distinguishes between, and provides different tax calculations for, "tangible property corporations" and "intangible property corporations." For domestic intangible property corporations, "net worth" is defined as the book value of the corporation's total assets less: (1) its liabilities; (2) *the book value of its tangible property in Massachusetts subject to local taxation*; and (3) the book value of its investment in subsidiary corporations "organized in the commonwealth" which represent eighty percent or more of the voting stock of the corporation. Mass. Gen. Laws ch. 63, §30(8) (emphasis supplied) (hereinafter "Section 30(8)").[2] By contrast, the net worth of a foreign intangible property corporation is simply its total assets less its liabilities. Mass. Gen. Laws ch. 63, §30(9). Under Massachusetts law, at least prior to the Massachusetts Supreme Judicial Court's decision in *Perini* and the Department of Revenue's issuance of Directive 99-1, a domestic intangible property corporation could claim certain deductions from net worth – namely, investments in Massachusetts tangible property and 80% owned Massachusetts subsidiaries – that a foreign intangible property corporation could not.

II.

In *Perini*, supra, the Massachusetts Supreme Judicial Court held that the state's method for determining the

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[2] As will be discussed in more detail herein, the Massachusetts Supreme Judicial Court declared certain aspects of Section 30(8) unconstitutional in *Perini*, supra.

taxable net worth of an intangible property corporation unconstitutionally discriminated in favor of domestic corporations. In reaching this conclusion, the Massachusetts Supreme Judicial Court focused exclusively on the deduction available to domestic intangible corporations, set forth at Section 30(8), for the book value of investments in 80% or more owned Massachusetts subsidiaries. The Court noted that such a deduction would not be available for a domestic intangible property corporation if it owned 80% or more of a non-Massachusetts corporation. Accordingly, the Court ruled that such a statutory scheme unconstitutionally and impermissibly imposed a heavier burden on domestic corporations that owned foreign subsidiaries than on domestic corporations that owned domestic (i.e., Massachusetts) subsidiaries. *Perini*, 419 Mass. at 768, 647 N.E.2d at 56. According to the *Perini* court, such discrimination violated the Commerce Clause of the U.S. Constitution.

In a subsequent recommendation concerning final judgment, a justice of the Massachusetts Supreme Judicial Court found that it was necessary to strike the words "organized in the commonwealth" from the third clause of Section 30(8) in order to cure the discrimination inherent in the statute. *Perini Corp., et al. v. Massachusetts Commissioner of Revenue*, C.A. No. 93-393, SJC-6657, May 13, 1996 (supplementing the original opinion of March 22, 1995). Significantly, neither the original *Perini* decision nor the supplemental judgment order addressed the constitutional ramifications of the deduction contained in Section 30(8) for tangible property located in Massachusetts subject to local taxation (hereinafter "clause two

of Section 30(8)"). Additionally, the Massachusetts legislature has not amended Section 30(8) since the *Perini* decision.

In response to the *Perini* decision, the Massachusetts Department of Revenue, on January 4, 1999, issued Directive 99-1. (App. 1). In Directive 99-1, the Department, in an attempt to address the constitutional infirmities in the corporate excise tax identified by the Massachusetts Supreme Judicial Court in *Perini*, announced that: 1) domestic and foreign corporations could choose either the formula for domestic or foreign corporations in determining whether they were classified as tangible or intangible property corporations for purposes of the property component of the excise tax; and 2) domestic and foreign intangible property corporations could choose either the formula for domestic or foreign corporations for determining net worth. The Directive specifically states that a corporation can deduct from its net worth the value of any 80% or more owned subsidiary regardless of where the subsidiary is organized or doing business. Like the *Perini* decision, however, the Directive fails to address the deduction available in clause two of Section 30(8) for the value of tangible property located in Massachusetts and subject to local taxation.

III.

Petitioners in the present matter challenged certain aspects of the corporate excise tax on constitutional grounds. *Textron*, supra. In the opinion below, the Massachusetts Supreme Judicial Court upheld the statute against the Petitioners' challenge. In so holding, the

Massachusetts Supreme Judicial Court found that Directive 99-1, by allowing any intangible property corporation (foreign or domestic) to deduct its investment in any corporation wherever domiciled in calculating its net worth, cured the constitutional defects in the statute as identified by the Massachusetts Supreme Judicial Court in *Perini*. According to the opinion below, the Directive rendered the constitutional infirmities in Section 30(8), for all practical purposes, "moot." *Textron*, 435 Mass. at 306, 756 N.E.2d at 1149.

IV.

The Massachusetts Supreme Judicial Court's declaration in the opinion below that Directive 99-1 renders the constitutional infirmities of Section 30(8) "moot" is erroneous because the Directive fails to address the discrimination inherent in clause two of Section 30(8). As noted, clause two provides a deduction from net worth for the value of tangible property located in Massachusetts subject to local taxation. By its very terms, the deduction is not available for investments in tangible property located outside Massachusetts. For the following reasons, such a provision violates the Commerce Clause of the U.S. Constitution.

It is a cardinal rule of Commerce Clause jurisprudence that no state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977) (striking down a tax imposed only on out-of-state exchanges); *Bacchus Imports, Ltd., et al. v. Dias*, 468 U.S. 263 (1984)

(invalidating an exemption for liquor produced in Hawaii only); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S.Ct. 1590 (1997) (property tax exemption limited to property of organizations serving primarily in-state residents violates Commerce Clause). Indeed, state laws discriminating against interstate commerce on their face are virtually per se invalid. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

In *Fulton*, a North Carolina intangibles tax that was imposed on stock to the extent that its issuing corporation participated in interstate commerce was found to violate the Commerce Clause. This Court held that "a regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce." *Fulton*, 516 U.S. at 333. In its most basic terms, *Fulton* stands for the proposition that a state tax that encourages in-state investment as opposed to out-of-state investment violates the Commerce Clause.

Clause two of Section 30(8) promotes the same type of impermissible discrimination struck down in *Fulton*. Under Section 30(8), an intangible property corporation, in determining its net worth, is permitted to deduct only personal property that is actually located in Massachusetts and subject to local taxation. Tangible property located outside Massachusetts is not eligible for the deduction. Thus, a taxpayer that invests in Massachusetts property derives a tax benefit that is unavailable to a taxpayer who invests in non-Massachusetts property.

This naturally encourages Massachusetts taxpayers to invest in Massachusetts, as opposed to out-of-state, property. Such a rule results in the type of "direct commercial advantage to local business" (*see Boston Stock Exchange, Bacchus,* supra) that is strictly forbidden by the Commerce Clause.

Directive 99-1, as well as *Perini,* fail to address the discrimination inherent in clause two of Section 30(8). Thus, Directive 99-1 is not the antidote envisioned by the Massachusetts Supreme Judicial Court in the opinion below to cure all constitutional infirmities contained in Section 30(8). By failing to address the in-state property deduction contained in clause two of Section 30(8), the Directive, contrary to the opinion below, falls short of rendering the discriminatory nature of Section 30(8) "moot." Directive 99-1 is nothing more than a convenient guise that allows Massachusetts to rationalize that the constitutional problems of Section 30(8) have been addressed. To the contrary, the problems remain. This Court should grant the petition for a writ of certiorari in order to prevent Massachusetts from enforcing a statute that remains constitutionally defective.

V.

By failing to address the remaining constitutional infirmities in Section 30(8), Directive 99-1 also violates the Due Process Clause of the U.S. Constitution. The Due Process Clause forbids any state to "deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, §1. In addressing the remedy

that should apply when a state's taxing statute is declared unconstitutional, this Court has consistently held that any such remedy must be "clear and certain." *Reich v. Collins*, 513 U.S. 106 (1994); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

For the following reasons, it is evident that Directive 99-1 does not provide the "clear and certain remedy" required by this Court's prior decisions. First, to the extent that Directive 99-1 fails to alleviate the discrimination resulting from limiting an intangible property corporation's deduction from net worth to Massachusetts property only, the Directive is not a "certain" remedy. Second, the Massachusetts Department of Revenue, in practice, has failed to apply the Directive as written. Pursuant to Notices of Intention to Assess Corporate Excise Tax dated July 26, 2001, the Department of Revenue informed General Motors that it would not be permitted to deduct from net worth its investment in 80% or more owned subsidiaries. The Department of Revenue's application of the Directive on audit is contrary to the express language of the Directive. Thus, the Department of Revenue's failure to apply the Directive as written renders the Directive an unclear and uncertain remedy and, accordingly, violates the Due Process Clause.

CONCLUSION

Despite the Massachusetts Supreme Judicial Court's decision in *Perini* and despite the Department's attempted administrative cure in Directive 99-1, Section

30(8) continues to discriminate in favor of Massachusetts corporations in violation of the Commerce Clause of the U.S. Constitution. The opinion below fails to recognize that Section 30(8) remains discriminatory even after *Perini* and issuance of Directive 99-1. Contrary to the opinion below, Directive 99-1 falls short of curing all discriminatory aspects of Section 30(8). The Directive, likewise, fails to provide the clear and certain remedy mandated by the Due Process Clause. Accordingly, it is imperative that this Court grant review to prevent Massachusetts from enforcing a statute that remains unconstitutional.

Respectfully submitted,

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February 25, 2002

[LOGO] COMMONWEALTH OF MASSACHUSETTS
Department of Revenue

Directive 99-1

Corporate Excise
Determining whether a corporation is a tangible property corporation or an intangible property corporation under G.L. c. 63 §§ 30.10, 30.11; calculating net worth of intangible property corporations under G.L. c. 63 §§ 30.8 and 30.9.

Introduction

In two instances the corporate excise statute requires foreign corporations and domestic corporations to employ different formulas in determining their tax liability. Specifically, those are: (i) the determination of a corporation's status as a tangible or intangible property corporation, and (ii) the calculation of net worth for intangible property corporations. Some elements of these formulas were invalidated on federal constitutional grounds. *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763 (1995), *cert. denied*, 516 U.S. 822 (1995). In accordance with the decision in *Perini*, this Directive clarifies the method for determining whether a corporation is a tangible or intangible property corporation, and for calculating an intangible property corporation's net worth.

Issues

1. How should domestic and foreign corporations determine whether they are tangible or intangible property corporations under G.L. c. 63 §§ 30.10, 30.11?

2. How should domestic and foreign intangible property corporations calculate their corporate net worth under G.L. c. 63 §§ 30.8 and 30.9?

Directive #1:

Domestic and foreign corporations are permitted to choose either of the two "Tangible or Intangible Property Corporation Classification" formulas from Schedule B of Forms 355A and 355B, for current and future taxable years, starting with the first tax year beginning after the date of this Directive. Thus, in making the determination of whether the corporation is a tangible or intangible property corporation, a domestic corporation can choose either (i) the formula for domestic corporations or (ii) the formula for foreign corporations, as the formulas are set out in G.L. c. 63 §§ 30.10, 30.11. Likewise, a foreign corporation can choose either (i) the formula for domestic corporations or (ii) the formula for foreign corporations, as set out in G.L. c. 63 §§ 30.10, 30.11. Corporations are permitted to make this choice annually.

Directive #2:

Regardless of the formula they choose to determine their status as an intangible property corporation, domestic and foreign intangible property corporations are permitted to choose either of the two net worth formulas, from Schedule D of Forms 355A and 355B, for calculating tax liability for current and future taxable years, starting with the first tax year beginning after the date of this Directive. A domestic corporation can choose either (i) the formula for domestic corporations set out in G.L. c. 63 § 30.8 or (ii) the formula for foreign corporations set out

in G.L. c. 63 § 30.9. A foreign corporation can choose either (i) the formula for domestic corporations set out in G.L. c. 63 § 30.8 or (ii) the formula for foreign corporations set out in G.L. c. 63 § 30.9. In applying these formulas, a corporation may deduct from its net worth the value of any subsidiary as to which the 80% voting stock interest requirement of the statute is satisfied, regardless of where the subsidiary is organized or is doing business. Corporations are permitted to make this choice annually.

Directive #3:

Corporations that would have benefited from the choice of formulas in this directive in prior tax years may be entitled to an abatement. Subject to the statute of limitations imposed by G.L. c. 62C § 37, corporations may apply for an abatement of taxes by using Form CA-6, according to instructions found at 830 CMR 62C.37.1 and TIR 93-11.

Discussion of Law:

The corporate excise statute provides separate methods for determining the status of domestic and foreign corporations as tangible or intangible property corporations. G.L. c. 63 §§ 30.7, 30.8. Under the statute, tangible and intangible property corporations are taxed differently under the non-income measure of the corporate excise. *See* G.L. c. 63 §§ 32(a)(1)(i), (ii), 39(a)(1)(i), (ii). The formulas for determining tangible/intangible status are set forth in the forms and instructions for Schedule B of form 355A (Domestic Business or Manufacturing Corporation

Excise Return) and Form 355B (Foreign Business or Manufacturing Corporation Excise Return).

Intangible property corporations are subject to a .26% tax on their net worth. G.L. c. 63 § 32(a)(ii), G.L. c. 63 § 39(a)(ii). The corporate excise statute provides separate formulas for calculating the net worth of domestic and foreign corporations. G.L. c. 63 § 30(8), (9). Those formulas are set forth in the forms and instructions for Schedule D of Form 355A and Form 355B.

The Supreme Judicial Court, in *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763 (1995), *cert. denied*, 516 U.S. 822 (1995), struck down as unconstitutional some parts of the corporate net worth formulas of G.L. c. 63 § 30.8 and 30.9. Specifically, the court invalidated the portion of G.L. c. 63 § 30.8 that prevented a domestic corporation from deducting from its net worth the value of a subsidiary not incorporated in Massachusetts if the domestic corporation owned 80% or more of the voting stock of the subsidiary. The court also invalidated the portion of G.L. c. 63 § 30.9 that prevented a foreign corporation from deducting from its net worth the value of a subsidiary incorporated or doing business in Massachusetts if the foreign corporation owned 80% or more of the voting stock of the subsidiary. The forms and instructions for the corporate excise return forms were revised to conform to the holding in *Perini*.

This Directive further clarifies the corporate excise statute in light of pending constitutional challenges to the divergent statutory treatment of domestic and foreign corporations. Without acknowledging the legal merit of these challenges, the Commissioner will permit corporations to determine whether they are tangible or intangible

property corporations using the statutory method for either domestic or foreign corporations, regardless of whether the corporation is domestic or foreign. Similarly, the Commissioner will permit such corporations to calculate their corporate excise using the statutory net worth formula for either domestic or foreign corporations.

Effective for its first taxable year beginning on or after January 1, 1999, a corporation may elect to use either the statutory formula for domestic or foreign corporations to determine whether the corporation is a tangible or intangible property corporation. The election is made by using Schedule B from either Form 355A or Form 355B on the return for that year. Likewise, effective for its first taxable year beginning on or after the date of this Directive, an intangible property corporation may elect to use either the statutory formula for domestic or foreign corporations for calculating its net worth. The Election is made by using Schedule D from either Form 355A or 355B on the return for that year.

Corporations that would have benefited in prior years from the choice of methods for determining their status as tangible or intangible property corporations, or from the choice of net worth formulas, may be entitled to an abatement. These abatements are subject to the statute of limitations set forth at G.L. c. 62c § 37. Corporations may apply for an abatement of taxes using form CA-6, according to instructions found at 830 CMR 62C.37.1 and TIR 93-11.

/s/ Bernard F. Crowley, Jr.
Bernard F. Crowley, Jr.
Acting Commissioner of Revenue
January 4, 1999

(3)

Supreme Court U.S.
FILED
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No. 01-1083

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

TEXTRON, INC., ET AL,
Petitioners,

v.

MASSACHUSETTS COMMISSIONER OF REVENUE
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION OF MASSACHUSETTS COMMISSIONER OF REVENUE

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19 pp

Question Presented

Does the Court have jurisdiction to review a challenge to a state tax under the Commerce Clause where the court below determined that

(1) the taxpayers were not adversely affected by the allegedly disparate treatment;

(2) the record did not establish an adverse effect implicating the Clause;

(3) in any event, administrative action by the state allowed the taxpayers to avoid any claimed adverse effect; and

(4) plaintiffs were not entitled to a judgment striking the entire Massachusetts corporate excise tax.

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Jurisdiction

Because an independent and adequate state ground supports the judgment below, regardless of the facial constitutionality of the challenged state corporate excise tax, this Court lacks jurisdiction to review the portions of the petition pertaining to the remedy sought by the taxpayer. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Facts

For purposes of this Brief in Opposition to the Petition for a Writ of Certiorari, the Respondent Massachusetts Commissioner of Revenue accepts and incorporates by reference the facts set forth in the decision of the Supreme Judicial Court. *Textron, Inc. v. Commissioner of Revenue*, 756 N.E.2d 1142, 435 Mass. 297 (2001) (reproduced in Appendix to Petition for a Writ of Certiorari at 1a-18a). In particular, see Appendix, at 3a-11a.

Reasons for Denying the Writ

I. THIS COURT LACKS JURISDICTION TO REVIEW THE SUPREME JUDICIAL COURT'S DENIAL OF THE REMEDY PETITIONERS SEEK, WHICH RESTS SOLELY ON STATE LAW.

This Court lacks jurisdiction to review a state-court judgment based on independent and adequate state grounds. *See generally* Robert L. Stern *et al.*, *Supreme Court Practice*, § 3.21, at 140-41 (7th ed. 1993) (collecting authorities). More specifically, "if the same judgment would be rendered by the state court after [this Court] corrected its view of federal laws, [this Court's] review would amount to nothing more than an advisory opinion," the issuance of which lies outside the Court's authority. *Herb*, 324 U.S. at 126. Because the Supreme Judicial Court correctly denied to the petitioners the state-law remedy that they seek, even if it incorrectly decided the federal Commerce Clause claims, any decision by this Court would be a mere advisory opinion.

Petitioners claim that (1) the Supreme Judicial Court erred in determining that petitioners failed to demonstrate that the challenged provisions of the Massachusetts corporate excise tax violate the Commerce Clause; and (2) because the challenged provisions are unconstitutional, Massachusetts law requires that the entire corporate excise tax law be set aside. *See* Petition at 15-16. Because Massachusetts law does not permit the corporate excise tax law to be set aside in this circumstance--even if the petitioners succeed on their facial constitutional claims--this Court cannot direct the petitioners'

desired result.

A. *The essence of the petitioners' claim is for a remedy governed by state law and unavailable under state law.*

The Massachusetts corporate excise tax is codified at M.G.L. c. 63, §§ 30-42B. Section 52 of Chapter 63 dictates the remedy in the event that any of these sections is invalidated. M.G.L. c. 63, § 52 (reproduced in Appendix to Petition at 53a-56a). Section 52 provides that, if Sections 32, 38C, 39, or 42B of Chapter 63--the provisions actually imposing the tax--are "declared unconstitutional or inoperative by a final judgment, order or decree of the supreme court of the United States or of the supreme judicial court of the commonwealth," then the "repeal-and-revive" remedy sought by petitioners applies. *See* M.G.L. c. 63, § 52 (Appendix, at 53a-56a).[1] If any other section of the corporate excise law (Section 30, 31A-31H, 32B-32D, 33, 38A-38B, 38D-38Q, 39A, 42, or 42A) is "declared unconstitutional or inoperative, the remaining parts of said sections thirty to forty-two B, inclusive, shall not be affected thereby." *See* M.G.L. c. 63, § 52 (Appendix, at 56a).

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[1]If invoked, the "repeal-and-revive" remedy would nullify the current Massachusetts corporate excise tax law and replace it with the state law in effect before 1919. M.G.L. c. 63, § 52 (Appendix, at 54a-55a). Under the pre-1919 law, the annual Massachusetts non-income excise measure for Petitioners and all other corporate taxpayers could not exceed $2000. Appendix, at 78a. Thus, application of the "repeal-and-revive" remedy would result in significant tax savings for the Petitioners and *amicus* General Motors Corporation. *See* Petition, at 23; Appendix, at 78a.

The petition is not within the jurisdiction of the Court because the petitioners' claim is one under state law. In rejecting the petitioners' claim, the Supreme Judicial Court noted that the "unambiguous" language of Section 52 makes the "repeal-and-revive" remedy inapplicable to the petitioners' challenge to Section 30, even if it were successful. *Textron, Inc.*, 756 N.E.2d at 1150 n.14, 435 Mass. at 308 n.14 (Appendix, 17a n.14). The Supreme Judicial Court followed longstanding precedent in declining to "stretch[]" Section 52 "to cover facts not within its fair meaning." *See id., citing* W *& J Sloane v. Commonwealth of Massachusetts,* 149 N.E. 407, 409, 253 Mass. 529, 535 (1925). The Supreme Judicial Court properly applied the plain language of Section 52 to conclude that the "repeal-and-revive" remedy would not apply even if that Court had found the challenged paragraphs of Section 30 unconstitutional. *See Textron, Inc.*, 756 N.E.2d at 1150 n.14, 435 Mass. at 308 n.14 (Appendix, 17a n.14) ("Accordingly the 'repeal and revival' remedy would not have been available to Textron notwithstanding our decision today."). The Supreme Judicial Court had reached the same result 72 years before in considering whether the "repeal-and-revive" remedy should be applied following this Court's invalidation of one paragraph of Section 30. *See Opinion of the Justices to the Governor and Council*, 168 N.E. 563, 538, 269 Mass. 611, 617-18 (1929) (opining that the "repeal-and-revive" remedy is "too violent an inference or construction to be warranted" in that circumstance). Thus, even if this Court were to reverse the Supreme Judicial Court as to the constitutionality of the four challenged paragraphs of Section 30, the petitioners still would not be entitled to the remedy they seek. The judgment denying the remedy rests on an independent and adequate state ground. Consequently, jurisdiction is lacking over the petition.

B. *The petitioners cannot establish this Court's jurisdiction over the judgment denying the state-law remedy by arguing that their preferred application of state law is constitutionally required.*

In order to gain a jurisdictional foothold, the petitioners argue that due process requires the application of the "repeal-and-revive" remedy and the consequent dismantling of the corporate excise tax structure that has been in place in Massachusetts for 82 years. *See* Petition at 25-28. Any other remedy, petitioners assert, constitutes a "bait-and-switch" maneuver in violation of due process. *Id.* This argument should be rejected for two reasons.

First, in Commerce Clause cases, due process is satisfied by any remedy that results in a non-discriminatory assessment. *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation of Fla.*, 496 U.S. 18, 41 (1941). In fact, the Supreme Judicial Court held that the Commissioner's application of the statute here did result in a nondiscriminatory assessment. *See Textron, Inc.*, 756 N.E.2d at 1151, 435 Mass. at 309 (Appendix, 18a). Thus, even if petitioners could succeed in showing constitutional infirmity in M.G.L. c. 63, § 30, they would not be constitutionally entitled to the "repeal-and-revive" remedy.

Second, petitioners cannot articulate a "bait-and-switch" challenge where they were never statutorily entitled to the remedy they seek.[2] The Massachusetts "hook" was never "baited" with the

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[2]The "repeal-and-revive" remedy has not been revoked or compromised in any way and remains available as the remedy to be employed if Sections 32, 38C, 39, or 42B are ever struck down by

"repeal-and-revival" remedy for constitutional violations in Section 30 of Chapter 63. *See* M.G.L. c. 63, § 52 (Appendix, at 56a) and discussion above (if sections other than 32, 38C, 39, or 42B are declared unconstitutional, those sections shall be severed without effect on other sections). Because no reasonable taxpayer reading the plain language of Section 52 could have believed that the "repeal-and-revive" remedy had ever been available for successful constitutional challenges to Section 30, its unavailability for the petitioners here has no due-process implications. *Cf. Reich v. Collins*, 513 U.S. 106, 111 (1994) (due process may restrict changing a remedy that reasonable taxpayers believed was actually available to them); *City of New York v. State*, 730 N.E.2d 920, 923 (N.Y. 2000) (assuming without discussion that "poison-pill" provision applied).

In sum, the Supreme Judicial Court's judgment denying the petitioners the "repeal-and-revive" remedy rests solely on that court's interpretation of state law, which does not implicate due-process concerns. Thus, this Court lacks jurisdiction to review the judgment. Because this Court's "power is to correct wrong judgments, not to revise opinions," the petition is not reviewable here and should be denied. *See Herb*, 324 U.S. at 126.

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this Court or by the Supreme Judicial Court. *See* M.G.L. c. 63, § 52 (Appendix, at 53a-56a).

II. THE UNIQUE FACTS CONCERNING THE TAXPAYER AND STATE ADMINISTRATIVE ACTION SHOW THAT THE PETITION DOES NOT RAISE MATTERS OF NATIONAL IMPORTANCE OR APPLICABILITY.

A. *The remainder of the petition asserts nothing more than that the Supreme Judicial Court erred when it concluded that the petitioners failed to show that Section 30 is constitutionally invalid.*

The balance of the petition claims merely that the Supreme Judicial Court erred when it concluded that the petitioners failed to show that M.G.L. c. 63, § 30(8),(9),(10), and (11) violate the Commerce Clause. *See* Petition at 16-22 (court erred in concluding that provisions do not unduly discriminate against interstate commerce); 22-25 (court erred in concluding that petitioners lacked standing); 28-29 (court's errors undermine integrity of constitutional protections for interstate commerce). While this Court may have jurisdiction to review the lower court's rejection of the petitioners' Commerce Clause claims, this case does not rise to the level of national importance warranting this Court's intervention and, therefore, the petition should be denied. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

B. *The Supreme Judicial Court did not err in concluding that the petitioners failed to demonstrate that the challenged provisions discriminate against interstate commerce.*

This Court should not grant the petition because the court below correctly rejected the petitioners' Commerce Clause claims.

1. The Supreme Judicial Court correctly concluded that the petitioners lacked standing to assert their challenge.

The Supreme Judicial Court did not err in concluding that the petitioners lack standing. The facts concerning standing were stipulated. First, as to paragraphs (10) and (11) of Section 30 (the "classification provisions"), none of the six petitioners has standing because they stipulated that they all would have retained the same classification (*i.e.*, "tangible-property" corporation *vs.* "intangible-property" corporation) regardless of which classification provision applied. *See Textron, Inc.*, 756 N.E.2d at 1148, 435 Mass. at 304 (Appendix, 12a). Thus, the court below correctly concluded that any difference between paragraph (10) and paragraph (11) had no effect on any of the petitioners and may not be challenged by them. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (no standing to sue in absence of "concrete and particularized harm").

Next, paragraphs (8) and (9) of Section 30 (the "net-worth provisions") define net worth for intangible-property corporations and thus apply to only one of the six petitioners, Textron, Inc.

("Textron").[3] Textron had zero taxable net worth for the subject tax years. *See Textron, Inc.*, 756 N.E.2d at 1149, 435 Mass. at 306 (Appendix, 14a). Thus, the Supreme Judicial Court held Textron lacked standing to challenge these provisions.[4]

2. Even assuming standing, the petitioners still failed to make out a case of discrimination against interstate commerce.

Although it concluded that Textron was not harmed by paragraphs (8) and (9) of Section 30, the Supreme Judicial Court assumed Textron's standing "for purposes of certainty and predictability of the corporate excise tax law." *See Textron, Inc.*, 756 N.E.2d at 1149, 435 Mass. at 306 (Appendix, at 14a). While recognizing the textual distinctions between paragraph (8) (pertaining

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[3]As tangible-property corporations, the other five petitioners determine their taxable net worth under M.G.L. c. 63, § 30(7), the constitutionality of which is not challenged here.

[4]All six petitioners attempt to "reverse-engineer" standing by arguing that, as corporate taxpayers in Massachusetts, they will benefit if the corporate excise tax law is dismantled and replaced with the pre-1919 law, under which their annual non-income excise measure could not exceed $2000. *See* Petition at 23 ("Petitioners stand to recover more than $900,000 in taxes paid[]" if the pre-1919 law were revived.); Appendix, at 78a. Rejecting this argument, the Supreme Judicial Court pronounced it "circular and without merit." *See Textron, Inc.*, 756 N.E.2d at 1148 n.12, 435 Mass. at 305 n.12 (Appendix, at 13a n.12). Because the petitioners were not harmed by the challenged provisions--regardless of the potential windfall to them if the "repeal-and-revive" remedy should be invoked--they lack standing to challenge them. *See Lujan*, 504 U.S. at 560.

to in-state corporations) and paragraph (9) (pertaining to out-of-state corporations), the Supreme Judicial Court noted the failure of the record to demonstrate any discriminatory effect from these distinctions:

> What is unclear, however, is how the different formulae adversely affect foreign corporations (for example, by resulting in a higher taxable net worth than for a comparable domestic corporation) or impermissibly burden interstate commerce (for example, by discouraging foreign corporations from doing business in the Commonwealth, or domestic corporations from acquiring foreign subsidiaries).

Textron, Inc., 756 N.E.2d at 1149, 435 Mass. at 307 (Appendix, at 15a). Without a negative effect on interstate commerce, there is no Commerce-Clause violation. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (no Commerce Clause violation where law "regulates evenhandedly with only incidental effects on interstate commerce.") (internal quotation omitted). Because the petitioners failed to demonstrate any unconstitutional effect of the provisions they challenge, the Supreme Judicial Court properly rejected their claims.[5]

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[5] *Amicus* General Motors Corporation ("General Motors") challenges a feature of M.G.L. c. 63, § 30(8) that was not challenged by the petitioners below: a deduction from net worth for tangible property situated in Massachusetts and subject to local (municipal) taxation. *See* Brief of General Motors Corporation as *Amicus Curiae* in Support of Petitioner, at 5. Because the argument General Motors makes was not raised below, it should not be considered by

3. Any disparate effects of Section 30 have been eliminated through state administrative action, which allowed Textron, Inc., to claim zero taxable net worth for the tax years in question.

Finally, even if the challenged calculation methods did yield different results for foreign and domestic corporations, any constitutional effect of that difference was "erased" by the Commissioner's issuance of administrative guidance allowing corporate taxpayers to choose the most beneficial calculation formula each year. *See Textron, Inc.*, 756 N.E.2d at 1149, 435 Mass. at 307 (Appendix, at 16a). The most beneficial formula for Textron yielded a taxable net worth of zero. *Id.* The Supreme Judicial Court rejected the petitioners' state-law claim--also not subject to review in this Court--that the Massachusetts Commissioner of Revenue lacked

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this Court. *See generally* Robert L. Stern et al., *Supreme Court Practice*, § 3.17, at 126-27 (7th ed. 1993). In any event, the claim lacks merit because General Motors fails to appreciate the complementary nature of the allowable deduction. The deduction expressly references local property taxes, signalling its purpose to partially offset the higher local property taxes paid by owners of in-state tangible property by way of a corresponding deduction from the net-worth component of the corporate excise tax. Because out-of-state tangible property is not taxed locally, it may be included in the net-worth component without offending the negative Commerce Clause. *See Oregon Waste Systems, Inc. v. Department of Envtl. Quality of Oregon*, 511 U.S. 93, 102-03 (1994) (recognizing constitutional validity of tax on interstate commerce that is "the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce"). For these reasons, General Motors raises no issues warranting this Court's review.

authority to issue this guidance. The lower court instead concluded that "the commissioner has lawful discretion not to enforce a doubtful statute or, as here, to interpret a statute in a manner that avoids potential constitutional issues." *Id.*, *citing Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). In issuing his administrative guidance, the Massachusetts Commissioner of Revenue properly exercised his enforcement authority under state law.

The petitioners' quarrel with the Commissioner's administrative guidance ("DD 99-1") rests in their characterization of it as a replacement remedy administratively supplanting the legislative "repeal-and-revive" remedy they would prefer. *See* Petition, at 25-28. DD 99-1 does not, however, purport to be any sort of "remedy." Rather, it represents only the reduction to writing of the Commissioner's valid internal policy decision not to enforce the textual distinctions between provisions relating to in-state corporations and those relating to out-of-state corporations. *See Textron, Inc.*, 756 N.E.2d at 1150, 435 Mass. at 307 (Appendix, at 16a). Thus, DD 99-1 interferes in no way with the proper application of the "repeal-and-revive" remedy.

Even if DD 99-1 did purport to remediate unconstitutional geographic distinctions in Massachusetts's corporate excise law, it does not replace any legislative remedy as far as these petitioners are concerned. As discussed above at I.B., the "repeal-and-revive" remedy sought by the petitioners was never available to them and so could not have been taken from them. The Supreme Judicial Court correctly rejected the petitioners' state-law challenge to the effect of the Commissioner's administrative directive. That ruling is not within the jurisdiction of this Court to review by certiorari and thus the petition should be denied.

Conclusion

For the reasons stated here, the Petition for a Writ of Certiorari should be denied.

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In The

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TEXTRON INC., *et al.*,

Petitioners,

v.

COMMISSIONER OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

Textron Inc. does not have a parent company, nor does any other publicly held company own 10% or more of Textron Inc.'s stock. Each of Textron Inc.'s affiliates that is a party to this case is a wholly-owned subsidiary of Textron Inc.

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REPLY BRIEF FOR PETITIONERS

Respondent makes three points in its Brief in Opposition. First, the lower court's decision was allegedly based on independent and adequate state grounds. (Br. Opp. 2-7.) Second, the case purportedly lacks national significance. (Br. Opp. 7.) Third, the state statutory scheme allegedly does not discriminate against interstate commerce because the lower court concluded that the scheme is not discriminatory (Br. Opp. 9-10), and because the overall discrimination inherent in the statutory scheme has supposedly been "erased" by the state's unilateral decision not to enforce some of the discriminatory provisions. (Br. Opp. 11-12.)

None of these points has substance. First, the decision of the Supreme Judicial Court of Massachusetts does not rest upon independent and adequate state grounds. Second, respondent's assertion that this case lacks "national importance or applicability" is belied by this Court's clear pronouncements that the Commerce Clause protection against discrimination in the area of state taxation is of great importance to the national economy. Third, respondent's defense to the statute's facial discrimination disregards this Court's controlling Commerce Clause doctrine and fails to respond to the incontrovertible fact that the state's tax scheme favors in-state over out-of-state corporations.

In short, as we demonstrate below, an analysis of respondent's Brief in Opposition reinforces the case for certiorari.

I. THE LOWER COURT'S DECISION DID NOT REST UPON INDEPENDENT AND ADEQUATE STATE GROUNDS

Respondent's contention that the decision of the Supreme Judicial Court of Massachusetts rests upon independent and adequate state grounds is erroneous. Respondent argues that, because the lower court indicated in *dicta* that the "repeal and revival remedy" would not be available in this case, any federal questions arising in the case need not be addressed by this Court. (Br. Opp. 2-4.) This argument is without merit.

This Court's decisions clearly establish that the presence or absence of a tax refund is not an independent and adequate state ground, and therefore does not preclude this Court from considering the constitutional issues presented by petitioners. In *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276 (1932), the taxpayer brought suit to set aside an assessment of state income taxes. The taxpayer argued that it was a denial of equal protection to exclude income from sources earned outside the state from taxable income for corporations, but to include such income for individuals. The state court refused to pass on the constitutional claim, reasoning that if the exclusion for corporations were invalid, the result would be that they owed greater taxes, not that the taxpayer would owe less. The Supreme Court ruled that this state ground was not an adequate basis for avoiding the constitutional question:

> [T]he Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected

> when such judicial action is properly invoked. . . . If the Constitution exacts a uniform application of this tax on appellant and his competitors, his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked. . . . *We therefore conclude that the purported nonfederal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory.*

Id. at 282-83 (emphasis added, citations omitted). *See also Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (in a case involving an equal protection challenge to a state tax statute, held that the state's "power to equalize the treatment of the petitioners and the competing domestic corporations by compelling the latter to pay hereafter the unpaid balance of the amounts assessed . . . is not material").

Likewise, in a subsequent case with remarkable similarities to this case, the Court confirmed that even the absence of a tax refund is not a basis for refusing to consider a constitutional question and cannot deprive a taxpayer of an opportunity to raise a constitutional challenge to a state tax. In *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), the taxpayer challenged on equal protection grounds a state tax provision that exempted from property tax merchandise and products owned by nonresidents, but provided for no exemption for residents. As in this case, the state court in *Allied Stores* declined to consider the constitutional question because,

in its view, the taxpayer lacked standing since, even if the offending provision were stricken, the taxpayer would not be entitled to a refund. This Court rejected that reasoning: "The proviso is the basis of appellant's claim of denial of the equal protection of the laws. With the proviso thus validly remaining in the statute it is *quite immaterial* that appellant's claim necessarily would fall if it were out. It follows that appellant does have standing to prosecute its constitutional claim." *Id.* at 526 (emphasis added).

Allied Stores and *Lawrence* establish that the absence of a tax refund is not an independent and adequate state ground for the state court's decision. Just as the refusal of the state courts to decide the constitutional question on standing grounds and on remedy grounds was a denial of the taxpayers' constitutional rights in *Allied Stores* and *Lawrence*, respectively, the refusal of the Supreme Judicial Court of Massachusetts to consider petitioners' discrimination claims on standing and remedy grounds is a denial of petitioners' constitutional rights in this case. The alleged state ground – the nonavailability of the "repeal and revival remedy" under Section 52 of the Massachusetts General Laws – is "unsubstantial," "illusory," and "quite immaterial."

Moreover, respondent's declaration that "[t]he *judgment* denying the remedy rests on an independent and adequate state ground" is not an accurate statement. (Br. Opp. 4 (emphasis added).) In fact, the court below held that petitioners lacked standing and disposed of the case on that ground. The lower court's discussion of the constitutional questions and the "repeal and revival remedy" was *dicta*. Accordingly, because the lower court did not

render a judgment on the remedy issue, the remedy issue cannot serve as an independent and adequate state ground for the court's decision.

Respondent's reliance on *Herb v. Pitcairn*, 324 U.S. 117 (1945), is misplaced. That case, cited by respondent merely for the undisputed principle that this Court will not review judgments of state courts that rest on adequate and independent state grounds, did not consider the specific tax issues raised here. In any event, the Court in *Herb* did not conclude that the state court's decision was based on an adequate and independent state ground. The Court held that the case should be continued to enable counsel to apply to the state court for an amendment or clarification indicating whether the court intended to rest the judgments at issue on state or federal grounds. *Id.* at 128. Accordingly, that case is of no relevance here.

In sum, respondent's contention that the lower court's decision is based on independent state grounds is both factually and legally deficient. This Court has the authority to consider each of the issues raised in the petition.

II. THIS CASE HAS NATIONAL SIGNIFICANCE

Respondent's assertion that this case lacks national significance is unpersuasive. Respondent provides no basis for its contention that this case lacks national significance; instead, respondent's brief merely cites to this Court's Rule 10, which provides that a petition for a writ of certiorari is rarely granted when the asserted error

consists of factual error or the misapplication of a properly stated law. (Br. Opp. 7.) Respondent offers no explanation why Rule 10 lessens the national importance of the issues raised in this case. There is no dispute as to the facts of the case. The decision below affects *every* multistate corporation doing business in Massachusetts. It undermines constitutional limitations on state taxation and threatens the national economy.

The Massachusetts court's decision held that taxpayers do not have standing to sue for a refund of taxes paid by them under a facially invalid statute. That holding conflicts with this Court's decisions and basic notions of due process. If left undisturbed, it would undermine state tax administration. Taxpayers must be assured of the right to fairly contest the propriety of taxes collected by the states.

The disputed statute, which provides additional deductions to domestic corporations and which treats corporations more favorably if they invest in in-state subsidiaries or engage solely in business in the state, is without question discriminatory. The importance of the free flow of commerce among the states is clear. It is equally clear that any threat to the flow of commerce is of overriding national importance.

Finally, respondent's attempt to minimize the national significance of this case is belied by the amicus briefs filed by the Council on State Taxation (COST) and General Motors Corporation. COST has a membership of over 500 multistate corporations engaged in interstate and international commerce, and General Motors is one of the largest corporations in the world. The interest that

COST and General Motors have expressed in this case, and their concern over its widespread implications, demonstrate the national importance of this controversy.

III. RESPONDENT OFFERS NO DEFENSE TO THE STATE'S DISCRIMINATORY TAX SCHEME

Respondent defends the state's discriminatory statutory scheme by merely referencing the lower court's decision. (Br. Opp. 10.) What the respondent fails to appreciate, however, is that the state court's reasoning is deficient and is incompatible with this Court's decisions striking down discriminatory state tax provisions. As described in detail in the petition, the Massachusetts statutes allow domestic, but not foreign, corporations classified as intangible corporations two additional deductions in arriving at the net worth tax base. The Massachusetts statutes require foreign corporations to apply a different and less favorable formula for classification as a tangible or intangible corporation, and the foreign corporation classification formula is skewed against those corporations with foreign, but not domestic, subsidiaries. These features of the Massachusetts tax scheme clearly burden interstate commerce.

While recognizing that a taxpayer "could show an impermissible burden" on interstate commerce arising from these provisions (App. 15a), the lower court concluded that on the record in this case, it could not state with certainty whether the challenged provisions are unconstitutional. (*Id.*) The state court mistakenly assumes that discrimination is measured on a taxpayer by taxpayer basis. In essence, the court held that discrimination

could be proved only if the petitioners established actual discrimination adversely affecting them.

This Court has rejected such an analysis. Under the Commerce Clause, a statute is not discriminatory in some instances and non-discriminatory in other instances. According to the Court, " 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994). In this regard, it is of no consequence that some out-of-state taxpayers may actually benefit under the tax scheme if the overall tax scheme "has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.' U.S. Const., Art. I, § 8, cl. 3." *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-87 (1987) (holding that a state axle tax is not saved because some out-of-state carriers which accrue high mileage in Pennsylvania pay the axle tax at a lower per-mile rate than some Pennsylvania-based carriers). Here, the plain language of the challenged provisions facially discriminates against out-of-state corporations, thereby exerting "inexorable hydraulic pressure on interstate businesses to ply their trade within the State." *Id.* at 286.

Finally, respondent's claim that the challenged statutes do not discriminate against interstate commerce is belied by its admission that "any constitutional effect of [the state's tax scheme] was 'erased' by the Commissioner's issuance of administrative guidance." (Br. Opp. 11.) The "constitutional effect" referred to in respondent's

brief is, of course, merely a euphemism for the discrimination that is at the heart of this case. For respondent to, on the one hand, continue to assert that the state's statutes do not discriminate against interstate commerce, and, on the other hand, acknowledge the discrimination and assert that it has been "erased" by administrative guidance is disingenuous. In the end, the respondent's voluntary attempt to, in substance, rewrite the state's statutes in a manner consistent with the Constitution cannot save the challenged statutes at issue here. The administrative guidance does not eliminate all discrimination, does not have the effect of a statute or regulation and can be changed or withdrawn at any time.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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No. 01-1083

IN THE

Supreme Court of the United States

TEXTRON INC., *et al.*,
Petitioners,

v.

COMMISSIONER OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONERS

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IN THE

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On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

This brief is submitted by the Council On State Taxation (COST) as *amicus curiae* in support of the Petitioners in the above captioned matter.[1] COST is a non-profit trade association whose membership consists of over 540 multistate corporations involved in interstate and international commerce. COST was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce and was separately incorporated on January 1, 1992. COST's objective is to preserve and promote equitable and

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consents of the Petitioners and Respondent have been obtained and filed with the Clerk of the Court.

nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST pursues this objective through legislative and judicial educational and advocacy campaigns.

One of the issues[2] raised by the Petitioners involves whether a state taxing agency, when confronted with the need to remedy a tax ruled unconstitutional, may contravene the specific substantive statutory remedy provided by its legislature and instead substitute a new and different administrative remedy (which, as a result of its unexpected creation, may not be a remedy at all). The Massachusetts' decision at issue directly and negatively affects COST's members by unconstitutionally restricting the remedies for an invalid tax. The decision concerns COST members because, as large, multijurisdictional corporations, they are frequently involved in issues related to the validity of a particular state tax, including Massachusetts taxes. State legislators and tax administrators also commonly consult COST and its members for recommendations on crafting appropriate tax legislation. COST's members look to the certainty and clarity of the available remedy in determining whether to recommend to a legislature certain tax provisions. Such reliance on an available remedy provides certainty to both taxpayers and the state. As such, COST's members are directly affected by the rejection of such certainty in this case and, thus, have a strong interest in its outcome.

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[2] The Petitioners have raised several issues in their Petition, including a challenge to the Massachusetts corporate tax law as discriminating against interstate commerce in violation of the Commerce Clause, a challenge to the finding of the Massachusetts Supreme Judicial Court that the Petitioners lacked standing to bring the challenge to the tax, and a challenge to the determination that an administrative remedy may constitutionally replace a statutory remedy. COST supports Petitioners' positions on each of these points but submits additional discussion only on the remedy issue because Petitioners have fully briefed any arguments COST would offer regarding the other issues.

REASONS FOR GRANTING THE PETITION

COST is submitting this brief because a conflict is appearing between the states as to whether a state tax agency must follow a legislatively mandated remedy for a tax found unconstitutional. A serious difference of opinion exists between taxpayers and many state taxing authorities on this issue and this Court represents the only national forum available for addressing this conflict. COST believes that the constitutionally appropriate remedy for an invalid state tax is one of the most pressing issues this Court faces in the state and local tax area. Because of the confusion surrounding the remedy issue and its prominence, COST and its members request this Court to overturn the Massachusetts Supreme Judicial Court's upholding of the Massachusetts Commissioner of Revenue's Directive substituting a different administrative remedy for the statutorily mandated remedy because this decision violates the Due Process rights of the Petitioners and threatens the expectations of all taxpayers involved in state tax challenges, today and in the future.

ARGUMENT

Under The Due Process Clause Of The United States Constitution, The Massachusetts Commissioner Of Revenue Has Unconstitutionally Deprived The Petitioners Of Their Property When The State Taxing Authority Failed To Provide The Petitioners With The Statutorily Mandated Remedy, And Instead Substituted A New, Unforeseen, And Inferior Remedy.

Due Process Remedy Rules in State Tax Cases

A remedy for a state tax declared unconstitutional must comply with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[3]

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[3] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. XIV, § 1.

Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 100 (1992). Under the Due Process Clause, a remedy is constitutional only if it meets two tests: 1) the remedy must provide either a predeprivation remedy or "meaningful backward looking relief," *id.*; and 2) the remedy must be "clear and certain," *Atchison, T. & S.F.R. Co. v. O'Conner*, 223 U.S. 280, 285 (1912); *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 18, 39 n. 22 (1990).

Massachusetts' Remedy Design and Application

Massachusetts, during the years at issue (and continuing by statute today), imposes an excise tax for the privilege of doing business in the state on domestic and foreign corporations. The corporation excise tax was enacted by Ch. 355, Acts 1919, effective January 1, 1920, and replaced a franchise tax levied on the value of capital stock. The tax base is measured in part by net income and in part by tangible property or net worth.

In 1995, the Massachusetts Supreme Judicial Court ruled that in two instances the corporate excise statute was unconstitutional because it discriminated against interstate commerce in violation of the United States Constitution. *Perini Corporation, et al. v. Commissioner of Revenue*, 419 Mass 763, 647 N.E. 2d 52 (1995). The provisions at issue in *Perini* dealt with two differences in the formulas used by foreign corporations and domestic corporations in determining their tax liability. Domestic corporations were allowed to use formulas that provided tax benefits unavailable to foreign corporations.[4] In their brief, Petitioners have demonstrated that several other elements of the tax base

[4] The specific discriminatory provisions were: (i) the determination of a corporation's status as a tangible or intangible property corporation, and (ii) the calculation of net worth for intangible property corporations.

calculation also continue to discriminate against non-Massachusetts corporations.

Once the Massachusetts courts declared the corporation excise tax unconstitutional, Massachusetts was under a constitutional obligation to provide an appropriate remedy.[5] The tax statute itself provides the remedy. Chapter 63, Section 52 of the Massachusetts statute regarding "taxation of corporations" is entitled "Unconstitutionality of excise tax law; effect; revival of former act". This remedy provision states (emphasis and omissions to enhance readability):

> If the provisions of . . . [the current] excise on foreign corporations . . . are *declared unconstitutional* . . . by any such final judgment . . . *such portion of the law* . . . *shall be null and void*, and such portion of said law . . . shall become inapplicable . . .. In such event, all laws applicable to foreign corporations, which were repealed or were made inoperative as to, or inapplicable to, such corporations . . . shall thereupon *be revived* and become operative . . . and shall be continued in full force and effect from the first day of January antedating by five years the first day of January of the calendar year in which such final judgment . . . [declaring the current tax unconstitutional] is entered, to the same extent as if . . . [the current tax] had not been enacted. The

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[5] The remedy issue encompasses two distinct elements—procedural and substantive. *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 18, 39 n. 22 (1990). A constitutionally adequate procedural remedy provides a method and a forum for a taxpayer to challenge a suspect tax. A constitutionally adequate substantive remedy fixes the infirmity of a tax once it is found unconstitutional. Here, the tax was ruled unconstitutional in an earlier case, but Petitioners have not been provided an adequate substantive remedy. Further, as noted in the Petitioners' brief, due to the improper finding of the Massachusetts court that most of the Petitioners lacked standing, they have not been afforded even a constitutionally adequate procedural remedy.

> commissioner and the local assessors shall . . . assess all taxes for which liability has been incurred under the laws revived . . . by the foregoing provisions . . .. *Excises declared invalid* by reason of the foregoing premises, which were assessed on or after the date when the laws repealed or made inoperative or inapplicable by . . . [the current tax] are revived, made operative or applicable or continued in force as herein provided, shall, to the extent that such excises have been paid and are unrefunded, *be credited against the taxes assessed for the same period under the laws revived* and again made operative, applicable and continued in force; provided, that if such credit exceeds the taxes due, *the excess shall be refunded.*

What does this language mean? It means that, *by statute*, if the current Massachusetts excise tax on corporations is ruled unconstitutional, the current tax disappears and the tax in existence before the current one becomes effective. This is the absolute rule enacted by the state legislature.

The statutory scheme in place before the current excise tax imposed a tax based on the capitalization of authorized stock of a foreign corporation. This statutory scheme was put in place in 1909 and was replaced by the current, now invalidated, system. There is no argument that that is what the statute provides.

The determination in *Perini* (and the other elements detailed in the Petitioners' brief) that the tax is unconstitutional should have triggered this statutory provision, to wit: the excise tax should cease to exist, and the tax on corporations must now to be calculated under the prior statutory scheme. However, the Massachusetts Department of Revenue did not impose the previous tax scheme. *Instead*, it created an entirely different remedy for injured taxpayers. In January of 1999 (four years after the tax was found unconstitutional by Massachusetts' highest court) the

Department of Revenue issued Directive 99-1 purportedly detailing the *sole* remedy for the unconstitutional excise tax on foreign corporations. That remedy allows taxpayers, both in-state and out-of-state, to *choose* which statutory formulas to use in calculating their excise tax. Thus, under the Directive, foreign corporations could now use the calculations formerly allowed only for domestic corporations.

The Directive (if actually enforced) may have eliminated the constitutional discrimination problem in *Perini*, but it failed to provide a constitutional remedy because it retroactively replaced the guaranteed statutory remedy. While it is pure conjecture as to why the Department had developed such a fondness for their current system, *amicus* is suspicious that the revenue implications of instituting the statutory remedy had something to do with the decision. *Amicus* understands, and in fact supports, states' efforts to address revenue issues prudently and conservatively, particularly in these uncertain economic times. However, what *amicus* cannot support is the complete replacement of an explicit, substantive, legislatively mandated remedy by an administrative, non-binding directive.

Massachusetts' Retroactive Substitution of A Non-Binding Administrative Remedy for a Clear, Substantive Legislative Remedy Violates the Due Process Clause

Due Process requires a remedy for an unconstitutional tax to be "clear and certain." A "clear and certain" remedy is a remedy that the taxpayer was aware of at the time it chose to protest the tax. The terms "clear and certain" imply that a taxpayer knows what its options are—that the remedial options are specifically defined and guaranteed. Absent such simple notice, a remedy cannot be "clear and certain."

Massachusetts' statutes provided a clear, substantive remedy for the situation in which the current corporate excise tax was found unconstitutional. The law provides that if the

current corporate excise tax is ruled unconstitutional, that law disappears and the prior capital stock tax becomes effective. The current corporate excise tax was in fact found unconstitutional but the Department of Revenue has prevented Petitioners from calculating their tax under the prior capital stock provisions.[6] Instead, the Department has substituted a new, retroactive, completely different, and financially inferior remedy for the statutory guarantee. At no point during the litigation over the constitutionality of the excise tax on foreign corporations was such a remedy contemplated. The legislature has never blessed such an administrative remedy. No taxpayer could have anticipated that given the clear, long-standing, legislative pronouncement regarding the legally required remedy that a different remedy would be adopted by the taxing agency after the litigation was lost by the state. Such a retroactive substitution by an administrative body of a legislative remedy is not "clear and certain"—it is confusing and unexpected—and thus cannot be constitutional.

This discussion over the administrative versus the legislative remedy is not an academic exercise—the state has kept money required to be refunded to the Petitioners under the legislatively mandated remedy. The difference between the remedy offered to the Petitioners under the Commissioner's calculation and what the taxpayer should receive under the statutory scheme is the due process violation. The Legislature promised the taxpayers a certain tax calculation, and the tax agency should not be allowed to take it away. A more quintessential taking of property without due process is hard to imagine.

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[6] The Department has never argued, and in fact no argument exists, that the statutory remedy provision is not relevant to the sections of the excise tax found unconstitutional.

Finally, as the Petitioners point out, the remedy provided by Massachusetts actually violates one of the clear standards already articulated by this Court—a state may not "bait and switch" in applying a remedy. *Reich v. Collins*, 513 U.S. 106 (1994). In *Reich v. Collins*, the taxpayer challenged the constitutionality of a state tax under a statutory refund provision. *Id.* The state tax code provided for both predeprivation challenges (protests) and post-deprivation challenges (refund suits). After the tax was ruled unconstitutional, the state tried to avoid paying the refund by arguing that since the taxpayer could have challenged the tax before paying the tax, the taxpayer had paid the tax voluntarily and no refund was due. *Id.* at 110. This Court soundly rejected this argument. *Id.* at 111. "Bait and switch" in the consumer protection world occurs when a company advertises a product, such as a television, for a very low price in order to entice a customer to enter the store. Once in the store, the customer is told that the store does not have that product but is offered a similar but different product for a more expensive price. Frequently, because the customer is already at the store and is prepared to make a purchase, the customer will buy the substitute and the store will make a higher profit than it would have made on the advertised product. This is just what Massachusetts did here: it offered the statutory remedy of reversion to the prior law if the current tax was found invalid, but when the Petitioners came to court to obtain the advertised remedy, the state basically said—we won't provide the statutory relief, but what we can offer you are these new, costly calculations. The Petitioners came to court expecting refunds under the statutory remedy scheme; the refunds were mandated by statute. Therefore, the Petitioners are owed the statutory relief originally provided.

States' Interpretations of the "Clear and Certain" Remedy Rule Are In Conflict

This Court's involvement in the remedy issue is particularly pressing because of a conflict that is arising among the states that have been confronted with the issue. For example, confronted by a situation similar to the current case, the Court of Appeals of New York held that the taxing agency *must follow* the statutory remedy, even though the remedy crafted by the taxing agency would otherwise have also fixed the invalidity of the tax. *City of New York v. State of New York*, 94 N.Y.2d 577 (2000). In this case, a commuter tax by New York City imposed only on residents of states other than New York was determined by the Court of Appeals to violate the Commerce Clause and the Privileges and Immunities Clause. In the statute applying the tax only to non-New Yorkers, the legislature had specifically provided that if the tax was found to be unconstitutional, then the tax was to be repealed in its entirety. The tax was ultimately ruled unconstitutional, and the City of New York proposed that the appropriate remedy would be to apply the tax to both non-residents and residents. This proposed remedy would have fixed the unconstitutional discrimination, but it was not the remedy provided for in the statute. Thus, the New York Court of Appeals rejected this remedy and followed the statutory requirement repealing the entire tax. The New York approach is not isolated. The Court of Appeals of Arizona has similarly held that the Department of Revenue did not have authority to add additional conditions to a tax refund, not found in the statute. *Arizona Dep't of Revenue v. Canyoneers*, 23 P.3d 684 (2001). The decisions in New York and Arizona are directly contrary to the decision in Massachusetts at issue here.

In fact, confusion abounds in general about when a new, different, unexpected remedy for an invalid tax may be imposed retroactively. Some states take the high road and

some states fight to the death to keep the ill-gotten gains. In *W.R. Grace & Co. and Chrysler Motors Corp. v. State of Washington, Department of Revenue*, 973 P.2d 1011, *cert. denied*, 528 U.S. 950 (1999), the Washington Supreme Court approved the retroactive application of a conditional credit as the sole remedy for the unconstitutional tax. In *General Motors Corp. v. City and Cty. of San Francisco*, 69 Cal. App. 4th 448 (1999), the California Court of Appeal came to the opposite conclusion (involving an almost identical tax) and mandated full refunds rather than the taxing authority's proffered conditional, partial refunds. Recently, following the finding in *In the Matter of Panhandle Eastern Pipe Line Co. et al.*, Kan. Supreme Ct., No. 86,277 (2002), that a tax benefit was illegally withheld, the state of Kansas announced plans to refund $25 million to the affected taxpayers. One of Kansas' state representatives recognized a fact that Massachusetts seems to have failed to internalize: Senate Minority Leader Anthony Hensley (D-Topeka) commented that: "I'm not sure we have any other option at this point . . .. We lost the suit." Massachusetts, like Kansas, lost the suit and therefore has no other option – it needs to pay up. Obviously, the disparity in the results demonstrated by these cases demonstrates a need for guidance and the role of providing such guidance falls squarely on this Court.

Procedural Reason for Accepting the Case for Review

An unequivocal definition of the requirements of a constitutional remedy for an unconstitutional tax and a mandate that the states provide this relief is also necessary because of the limited forums available to taxpayers to pursue the available remedies. A taxpayer generally cannot challenge the constitutionality of a state or local tax in the lower federal courts. U.S. Const. Amend. XI; 28 U.S.C.

§ 1341. The Eleventh Amendment[7] prohibits suits for monetary damages against a state in federal court and thus prevents all suits for state tax refunds. *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 462 (1945). The Tax Injunction Act, as interpreted, prohibits taxpayers from bringing any action in federal court if there is a "plain, speedy, or efficient" remedy at state law. *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 422, 444 (1998). Most of the cases interpreting the Tax Injunction Act have determined that state refund or protest systems are plain, speedy, and efficient and thus jurisdiction in the federal courts is generally prohibited. *See, e.g., id.; California v. Grace Brethren Church*, 457 U.S. 393 (1982). While this Court has accepted several state tax remedy cases in the past, review by this Court is anything but guaranteed. Thus, taxpayers are usually limited to a state court as the final arbiter of what is an adequate remedy. In order to ensure that these state courts provide a constitutionally sufficient remedy, COST respectfully requests this Court to accept this case for review.

Remedy Issue Is Of Significant Importance

Finally, we note why we are so exercised about this case. It is not hyperbole to state that the issue of remedies for unconstitutional taxes is one of the single most important issues[8] in state and local tax today. Time and again over the past several years, taxpayers have been denied a constitutional remedy by state courts. This is real money being lost by real taxpayers. With the loss of this money, a certain amount of faith in the system is also lost. Taxpayers' only recourse is to appeal to this Court. States continue to

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[7] "The Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by citizens of another state . . .." U.S. amend. XI.

[8] The other pressing issues being nexus concerns and discriminatory taxes.

impose unconstitutional taxes and when a court ultimately invalidates these taxes, many states nevertheless refuse to provide the taxpayer with constitutionally sufficient relief. This situation is a source of significant frustration[9] to taxpayers and this Court is the only forum in which a solution is available. In fact, over the past year the issue of remedies has reached such significance in the state and local tax community that the topic has been a feature of at least three of the major state tax conferences.[10] Perhaps, if the states are forced to confront the true costs of providing a constitutionally adequate remedy, the legislatures will be more mindful in crafting their tax statutes to begin with and will be quicker to fix a constitutional problem when it comes to light. If this Court clearly exhibits its intent to enforce the Constitution's remedy rules on the states, states like Alabama (unconstitutional franchise tax) and California (unconstitutional dividends received deduction) may decide in the future not to keep their clearly unconstitutional taxes on their books for a lengthy and ultimately costly fight. Such a result will save the states, taxpayers, and ultimately this Court unnecessary and repetitive litigation. COST and its members hope that this Court will again add light to this important issue.

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[9] The lack of adequate remedies has become somewhat of a depressing joke at taxpayer gatherings. Some taxpayers, after years of ultimately successful litigation challenging a tax have taken to cynically waving a dollar bill in the air and commenting that they have not received even one dollar in refunds from the suit. This is a sad commentary on the current system.

[10] Paul J. Hartman (Vanderbilt) State & Local Tax Forum 2001, New York University State and Local Tax Institute 2001, Georgetown SALT Institute 2002.

CONCLUSION

For the reasons stated above, and because this tax scheme is one confronted and challenged by taxpayers in several states, COST respectfully requests the Court to accept this case for review.

Respectfully submitted,

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